Administrative Conference
of the United States

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SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION

Office of
the Chairman
1987

Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished through direct action on the part of the affected agencies or legislative changes.

SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION

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Chairman's Foreword

Elected officials and citizens throughout the United States share the concern that much litigation is unduly costly in time, money and human resources. While the federal government often has been a target of these concerns, it has tried as well to respond to them. During the past fifty years--and with varying degrees of success--dozens of regulatory reform proposals have been made, and many initiatives undertaken, to increase governmental efficiency, fairness and effectiveness. Building on the recent interest of the private sector and judiciary in the use of alternative means of dispute resolution (ADR), the federal government now has another opportunity to move toward those objectives.

Forty years ago, the legislative compromise embodied in the Administrative Procedure Act had administrative law borrow much of its formal processes from the judicial model. However, in recent years there has been growing dissatisfaction with adversarial procedures which can impose high transaction costs on both agencies and the participating public. Such procedures often exacerbate conflict and make consensual resolution of disputes more difficult. While agencies have sought to provide structured opportunities and incentives for affected interests to resolve outstanding issues through negotiation, these efforts have, for the most part, been decidedly experimental and tentative. Both agency adjudication and rulemaking are ripe for the application of innovative alternatives being developed elsewhere for streamlining dispute resolution and encouraging settlements.

In fact, the federal government can, and should, take an active leadership role in the ADR area. As party to more controversies than any other entity, the government has a special opportunity to assess the viability of ADR opportunities, use them aptly, and serve as an example for the rest of our society. It must be recognized, however, that the government has unique obligations that may often make use of these alternatives difficult, or even inappropriate.

It is time, therefore, to evaluate ADR's potential for federal agencies and to address directly the social, economic, political and procedural problems that are of concern. Given the enormous numbers of adjudications and other disputes that agencies decide, or are parties to, the successful use of ADR in even a small proportion of cases can produce better and fairer decisions, gains in efficiency, savings of time and energy, and ultimately foster greater confidence in government. By using more consensual approaches to dispute resolution whenever possible, the federal government can itself become a model for a constructive approach to problem solving.

The Administrative Conference has already undertaken numerous projects to increase understanding and facilitate utilization of ADR, and we will continue to build on these efforts to explore ways in which mediation, minitrials, arbitration, and related techniques can be employed by federal agencies. We also hope to play a major role in publicizing the research already completed and urging agencies to make greater use of these techniques. Since the Conference is itself an agency of the federal government, it is uniquely situated to accomplish these goals.

I hope that publication of this sourcebook on federal agency use of alternative means of dispute resolution, and its companion volume on negotiated rulemaking, will stimulate increased interest and activity in this area. Success will lead both to greater government efficiency and greater fairness in the resolution of disputes involving the government.

Marshall J. Breger
Chairman

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Introduction

This sourcebook has been prepared in connection with the colloquium on "Improving Dispute Resolution: Options for the Federal Government," presented by the Administrative Conference of the United States and held in Washington, D.C. on June 1, 1987. The colloquium is part of an effort to focus attention within the government on the possibilities and potential problems of using alternative means of dispute resolution in controversies involving the federal government. While the federal government has played an important role in promoting the use of alternative processes in areas such as labor relations (through the Federal Mediation and Conciliation Service), community relations (through the Community Relations Service of the U.S. Department of Justice), and consumer affairs (through the Federal Trade Commission), its consideration of alternatives in matters to which it is a party has been more recent.

The materials that follow have been compiled to assist government representatives to become familiar with various dispute resolution alternatives, some of the issues unique to use of ADR by agencies, and the experiences of some agencies that have initiated ADR policies or programs. Certain items provide an historical perspective on the subject while others reflect recent activity and thinking.

Section I provides an overview of ADR, both generally and in the context of the federal government. Section II focuses in more detail on specific dispute resolution mechanisms with primary emphasis on mediation, minitrial and arbitration. It also includes articles on other approaches including negotiation, mandatory settlement conferences, summary jury trials and court-appointed masters. Section III describes the various federal agency policies and practices in use at this time. Section IV collects forms and procedures that have been, or can be, used to implement ADR in specific cases as well as on an agency-wide basis. It includes materials developed by private groups as well as by several federal agencies. Section V presents articles that consider some of the issues that arise in agency implementation, such as acquisition of the services of neutrals, the need for confidentiality and the potential for resistance on the part of participants.

There exists substantial additional literature on ADR and a broad range of organizations and individuals knowledgeable in the field. Persons desiring more information may contact the Administrative Conference of the United States, Office of the Chairman.

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1. OVERVIEW OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION

A. General

PATHS TO JUSTICE:

MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION

Report of the Ad Hoc Panel on
Dispute Resolution and Public Policy

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INTRODUCTION

Society cannot and should not rely exclusively on the courts for the resolution of disputes. Other mechanisms may be superior in a variety of controversies. They may be less expensive, faster, less intimidating, more sensitive to disputants' concerns, and more responsive to underlying problems. They may dispense better justice, result in less alienation, produce a feeling that a dispute was actually heard, and fulfill a need to retain control by not handing the dispute over to lawyers, judges, and the intricacies of the legal system.

This perspective is evident in the growing interest in dispute resolution at many levels in the public and private sectors of society. Dispute resolution has been the subject of cover page articles in prominent newspapers and national magazines. Chief Justice Warren E. Burger has repeatedly called for a "comprehensive review of the whole subject of alternatives to courts" for settling disagreements. Harvard University President Derek C. Bok describes the American legal system as flawed and calls for a hard look at reform.

Attorney General William French Smith and Griffin Bell, his predecessor, advocate exploring methods other than litigation to settle differences. State and federal courts are implementing a wide range of alternatives to adjudication. An increasing number of jurisdictions have established court-annexed dispute resolution programs in which cases are referred to mediation or non-binding arbitration before they are tried. Other courts are experimenting with innovative ways to facilitate settlement.

The Administrative Conference of the United States recommends testing the use of negotiations as a way of improving the rulemaking process and developing better rules. Some federal and state agencies are trying new procedures to reduce massive backlogs of pending complaints and appeals as well as to improve policy development generally.

Legislatures, too, have demonstrated interest in alternative dispute resolution techniques. Congress passed the Dispute Resolution Act in 1980 to encourage the development of methods for resolving civil and criminal disputes without litigation and to create a dispute resolution clearinghouse. As yet, no funds have been appropriated to implement the Act. A number of states have enacted dispute resolution legislation and, in some instances, established statewide dispute resolution programs.

There are also significant private sector initiatives which provide for the resolution of consumer complaints, small commercial disputes, insurance claims, and conflicts between businesses by such means as mini-trials, "rent-a-judge" and the increased use of arbitration and mediation. Grievance procedures within institutions, such as hospitals, universities, prisons, and schools, have been created. Ombudsmen, media action lines, medical malpractice screening panels, and divorce mediation are other examples of alternative dispute resolution approaches which are receiving more attention.

In the first half of 1983 alone, major national conferences were conducted on peacemaking and conflict resolution, family dispute resolution, environmental dispute resolution, and consumer dispute resolution. The American Bar Association, through its Special Committee on Dispute Resolution, has encouraged the development of neighborhood justice centers--now totalling more than 200 across the nation—and currently is working to establish several "multi-door courthouses." The American Arbitration Association has expanded its activities to include conflict resolution, training, and technical assistance in a broad range of areas. The Society of Professionals in Dispute Resolution has similarly grown to reflect diversification in the field.

Mediation is being used to address complex, multi-party controversies and to develop consensus positions on difficult policy issues. Applications include intergovernmental disputes and issues involving the environment, land and natural resources, Indian claims, civil rights, corrections, and community conflicts.

But, just as alternative dispute resolution mechanisms offer great promise, they also raise many questions and create their own problems. Just what are the respective roles of courts and the various alternatives? How should they relate to one another? How should it be determined which dispute resolution mechanism is most appropriate in a particular case? Do alternatives really save time or money? How should they be financed? How should settlements be enforced? Are alternatives to the courts "second-class justice"? What are the standards by which dispute resolution mechanisms should be evaluated?

CREATION OF THE PANEL

In early 1983, the National Institute for Dispute Resolution convened the Ad Hoc Panel on Dispute Resolution and Public Policy under the sponsorship of the U. S. Department of Justice. The Institute assembled this group of prominent citizens to identify public policy issues associated with the ways Americans settle their disputes and to suggest strategies for furthering public knowledge about dispute resolution.

This was an inquiry, not by dispute resolution practitioners or court reform experts, but by members of the general public from their perspective as potential disputants, as citizens, and as taxpayers. Individuals on the Panel were chosen for their first-hand knowledge and demonstrated leadership in a diversity of areas: labor, business, health, education, welfare, civil rights, housing, consumer affairs, the media, federal regulation, public and judicial administration. Some represent the interests of particular populations: the poor, women, blacks, hispanics, the elderly. Members served as individuals, not as representatives of any organization. They were invited to raise--not resolve—issues.

A Steering Committee was responsible for directing the work of the Panel, including assembling its members, preparing discussion papers for its consideration, and drafting this report. What follows are highlights of the discussions of the Ad Hoc Panel on Dispute Resolution and Public Policy as they occurred during three one-day meetings in Washington, DC.

DEFINING DISPUTE RESOLUTION

The Panel defined the scope of its inquiry to include all methods, practices, and techniques, formal and informal, within and outside the courts, that are used to resolve disputes. Although the term "dispute resolution" and the frequently used phrase "alternative dispute resolution" have come to suggest ways of settling disputes without going to trial, the Panel included litigation among dispute resolution options to be considered. Because the traditional system and the so-called alternative systems are inextricably bound, the Panel explored them as one. Table 2 in Appendix 1 represents different ways of conceptualizing the range of dispute resolution methods.

Dispute resolution techniques can be arrayed along on a continuum ranging from the most rulebound and coercive to the most informal. Specific techniques differ in many significant ways, including:

- whether participation is voluntary;
- whether parties represent themselves or are represented by counsel;

- whether decisions are made by the disputants or by a third party;
- whether the procedure employed is formal or informal;
- whether the basis for the decision is law or some other criteria; and
- whether the settlement is legally enforceable.

At one end of the continuum is adjudication (including both judicial and administrative hearings): parties can be compelled to participate; they are usually represented by counsel; the matter follows specified procedure; the case is decided by a judge in accordance with previously established rules; and the decisions are enforceable by law. Closely related is arbitration, which is less formal, proceeds under more relaxed rules, and may be binding or non-binding.

At the other end of the continuum are negotiations in which disputants represent and arrange settlements for themselves: participation is voluntary, and the disputants determine the process to be employed and criteria for making the decision. Somewhere in the middle of the continuum is mediation, in which an impartial party facilitates an exchange among disputants, suggests possible solutions, and otherwise assists the parties in reaching a voluntary agreement. Options among these alternatives may be combined in various ways, including what is known as med-arb. The terms used above and others, like conciliation, ombudsman, and mini-trial, are defined more fully in the lexicon in Appendix 2.

Most forms of dispute resolution have been in use for years. That they are now being characterized as innovative reflects the extent to which they are being institutionalized and applied in new situations, and the increased level of expectation being attached to them.

The wide boundaries that the Panel set for its discussions of dispute resolution include:

—All disputes which could go to civil court, including disputes between individuals such as those which occur within families, among acquaintances, and in neighborhoods; disputes among organizations and institutions, for instance, between citizen groups and corporations or governments; and disputes pitting individuals against institutions, such as against corporations or a governmental agency.

—Matters subject to criminal law, especially those conflicts within a family or neighborhood that could be heard in civil forums and defused before it is necessary to involve the police and courts; disputes that end up in criminal court because one or all sides lack the information, influence, or funds to pursue a civil remedy; and disputes which are a criminal matter in one jurisdiction but a civil matter somewhere else.

—Disputes heard by administrative agencies, for instance those related to the development and implementation of governmental regulations; the allocation of federal, state, and local resources; and a broad range of complaints and grievances such as the tens of thousands of cases involving Social Security, veterans' benefits, black lung payments, and other federal compensation programs.

—Disputes that are now left unresolved for the lack of a suitable forum. Perhaps one party is intimidated by the forum which is available, lacks the funds for access to it, or has little confidence in it. In other instances, no single forum can, or will, address the kind of dispute presented (for example, a homeowner's objection to little league baseball games on the church lot across the street). Unresolved, these disputes may fester, causing social antagonisms and escalation of a minor controversy into a major problem.

—Disputes that could be prevented or limited. A significant number of actions to define and challenge legislation and regulations could be avoided if interested parties were more involved in their development and the disputes that new programs might engender were anticipated. Similarly, there are complex social issues (involving school desegregation, environmental concerns, allocation of public resources) that might be better addressed through multi-party participation in the formulation of policy rather than through later court challenge.

Lastly, the Panel recognized that some conflict contributes to and, indeed, is essential to a healthy, functioning society. Social change occurs through disputes and controversy. Some observers attribute the long-term stability of the country to its ability to hear and reconcile the disagreements of its diverse population. Thus, one should focus not only on avoiding disputes, but also on finding suitable ways of hearing and resolving those that inevitably arise.

DISPUTE RESOLUTION AND THE U.S. LEGAL SYSTEM

Many experts within the legal establishment are joined by lay critics in believing that the country is suffering from "too many laws, too many lawsuits, too many legal entanglements, and too many lawyers." Contrary to popular belief, however, the problem does not seem to be excessive litigation. Although there has been a rapid growth in the number of cases filed, only 5-10 percent of filings actually go to trial. The number of cases litigated does not appear to be increasing at a rate faster than the population is growing. This increase is rather modest in a country that is experiencing as much social and technological change as is the United States.

So the issue is not so much one of caseload as of complexity, prohibitive cost, and delay in using the courts. In fact, the United States has the largest bar and the highest rate of lawyers per capita of any country in the world—the number having more than doubled since 1960, to more than 612,000. And yet, it has been estimated that 1 percent of the U.S. population receives 95 percent of the legal services provided. As Derek Bok points out, "the elaborateness of our laws and complexity of our procedures...raise the cost and delay of legal services such that countless poor and middle class victims (must) accept inadequate settlements or give up any attempt to vindicate their legal rights."

This is a situation with important implications. Not only is the largest segment of our population precluded from real access to the justice system, the biggest users of legal services--corporations and wealthy individuals--pay an enormous price. Legal expenditures are growing at a rate faster than increases in the gross national product. Productivity is affected by the drain on time and money available for other endeavors.

Enthusiasm for a wider range of dispute resolution options is tied, then, to a hope that new methods will not only reduce the burden on the courts and the economy, but will provide more satisfying means to justice for a larger portion of the population. In fact, the search for new ways of managing our differences can be seen as signaling a shift in public values. With increasing awareness that "we are all in this world together," traditional win-lose, adversarial processes may be personally and socially less satisfactory than more participative, collaborative problem solving that reconciles the interests of all involved parties.

It was within this larger social context that the Panel examined dispute resolution options.

CHOOSING AMONG DISPUTE RESOLUTION OPTIONS

No one approach is best for resolving all disputes. The nature of the dispute and the disputants will, in large measure, determine which dispute resolution method is most appropriate. Among the characteristics that might suggest one approach over another are whether the relationship among disputants is of a continuing nature, the disputants' financial circumstances, their desire for privacy and control of the dispute resolution process, and the urgency of resolving the dispute.

One must be wary of ascribing particular attributes to one or another method of dispute resolution, however. Litigation is not always final, although that is a commonly perceived benefit; mediation may not enable parties to work together in the future, as is often suggested; arbitration may not always be less expensive than pursuing a case in court. And all dispute resolution methods may have unanticipated consequences that make them more or less desirable in particular instances.

With that caveat, the Panel reviewed the advantages and disadvantages of three major kinds of dispute resolution methods: litigation, arbitration, and mediation. Readers may wish to refer to Tables 3, 4, and 5 in Appendix 1.

Advantages and Disadvantages of the Courts

The concern expressed repeatedly by the Panel is that courts are simply too expensive and too time consuming. Although the government subsidizes many of the costs of running the courts their full use requires expensive lawyers and the time of the disputants. This means that courts are generally inaccessible to all but the most wealthy parties. Hence, the courts tend to be the province of large organizations and concomitantly the ten-year anti-trust case consumes a disproportionate share of judicial resources. Thus, although courts are vitally important for protecting private rights and concerns, the delay and costs may render them ineffective in discharging this critical duty.

Because of the relatively structured approach courts use, the range of remedies available to the court may be quite limited. Indeed, lawyers may have to reframe the issues separating the parties to fit a particular legal doctrine and, thus, may change the nature of the dispute. As a result, the court is often not able to address the real issues and tailor an appropriate remedy.

Courts largely rely on a formal adversarial process that may further antagonize the disputing parties. Thus, a judicial approach may not be the preferred forum for settling disputes in which the parties will continue to have a close working or living relationship. Further, because the process is also somewhat mystifying to many laymen, they may become estranged from the court.

Some disputes require a technical expertise for their resolution and, since judges are necessarily generalists, courts may be inappropriate for some controversies. In others, even though judges could be educated sufficiently to make the decision, that may not be an efficient use of resources. Moreover, the existing expertise of the parties is generally not tapped in shaping a resolution because of the way roles are defined. Table 1 in Appendix summarizes some problems with using the courts.

These concerns notwithstanding, courts continue to provide indispensible services to society. They are the appropriate forum when the purpose is to establish a societal norm or legal precedent. Thus, for example, if the underlying cause of a dispute is not a disagreement over how to apply an accepted norm but rather a need to create such a principle, then courts--or the legislature—are the appropriate forum. Groups and individuals who lack economic power or social status are likely to need the courts to protect their rights and preserve their leverage in dealing with others.

Courts are also the preferred method of establishing a record of something that happened in the past. If the resolution of a dispute turns on reconstructing the facts—or at least on developing an authoritative version of the facts—then courts best serve that function. They also provide the official recognition and basis for enforcement which society demands in the resolution of some disputes, such as divorce and bankruptcy, for example.

Some cases get to court not because they have these characteristics that commend them for judicial resolution, but because of the exigencies of the situation. Some issues are sufficiently controversial that at least one of the disputants does not want to take the responsibility for voluntarily participating in its resolution. Instead, the dispute will be submitted to adjudication to deflect responsibility for the eventual, possibly unpopular, decision. School desegregation and other sensitive cases involving elected officials often fall into this category. Another example is the corporate dispute where the stakes are too high for a middle level officer to take responsibility for losing and, hence, the matter is submitted to a court to neutralize responsibility. Courts are also used sometimes when one party wants to delay a decision for as long as possible.

Most cases that are filed do not go all the way to judicial resolution. Nevertheless, filing a lawsuit may serve important functions and be a necessary prelude to using other methods for resolving disputes. It crystallizes the issues and provides the disputants with ways of compelling participation, procedures for sharing information, motivation for taking action, and deadlines for doing so. Thus, many cases are resolved through "bargaining in the shadow of the law."

In fact, courts themselves engage in a variety of dispute resolution techniques. Judges and other court officials attempt to promote pretrial settlements in virtually every case that comes before them. A judge who tries to bring parties together for a settlement is engaging in a form of mediation.

Sometimes, to avoid any bias, this is done by a magistrate or a judge other than the one who would preside should the case move to trial. Here, the judge may push very hard for settlement short of trial, and the parties may accede for fear of alienating the decisionmaker. This kind of judicial mediation should be distinguished from the purer and less interventionist forms discussed later.

Courts also use special masters and referees as fact-finders, whose findings then are used to help parties reach settlements. An increasing number of jurisdictions have court-annexed mediation and arbitration programs for special categories of disputes. Unaided negotiations between counsel for the parties are also common.

Indeed, only a small minority, roughly 5-10 percent, of the cases filed actually go to trial. The remainder are resolved before trial—some by abandonment, some by judicial ruling, and the majority by settlement between the parties. Those that do reach a decision become "public goods" that establish the standards against which future cases are negotiated or activities governed. To an extent, however, this norm-setting might be enhanced with even less litigation if settlements were also published; alternately, some argue that settlements might be inhibited by publishing.

Advantages and Disadvantages of Other Forms of Dispute Resolution

Arbitration and mediation are the two most widely known nonlitigative methods of dispute resolution. Arbitration, widely accepted and used in labor and management grievances and in some commercial settings, has special advantages over the courts, among them:

—It can be initiated without long delays; the procedure is relatively short; and a decision can be reached promptly.

—Relaxed rules of evidence enhance flexibility and the process is more streamlined than a judicial proceeding.

—The parties may select the applicable norms--that is, they can specify a particular body of law as a basis for a decision that might not be relevant in a court setting.

—The parties are able to choose the arbitrator.

—The arbitrator can be required to have expertise in the subject matter of the dispute.

—The resolution can be tailored to the circumstances.

—The dispute can be kept private since the decision is not necessarily a public document, as it would be in a court proceeding.

—Arbitration may be less expensive than going to trial.

—An arbitrator's decision is final and may be binding on the parties.

—The award in binding arbitration usually is enforceable by a court with little or no review.

In sum, with arbitration, decisions can be reached with relative speed and finality. Arbitration has proved especially valuable to parties that have a large number of disputes which must be resolved during the course of a contractual relationship. Labor-management and contractor-subcontractor relationships are examples.

But the efficiency of arbitration sometimes may be achieved at the expense of the "quality of justice" in an individual decision. In commercial and labor cases, where there is a high volume of cases with fairly low stakes, trade-offs between an expeditious, inexpensive arbitration process and the assurance of a more studied decision in each case may be acceptable. In other types of disputes, parties may not agree to arbitration because they want the protection offered by the courts, or they want to maintain control over a settlement through a process of negotiation. Thus, for example, a party may be more willing to use arbitration to determine the amount in controversy than initially to establish liability.

Further, arbitration has become so formalized in labor relations that it has developed some of the problems of procedure and delay present in judicial process. It should be noted, too, that an arbitration hearing may be more expensive and time consuming than the negotiated settlement which might otherwise have occurred.

Mediation is a valuable approach to the many disputes that are better settled through negotiation than adjudication. Among the benefits of mediation:

—It may provide an opportunity to deal with underlying issues in a dispute.

—It may build among disputants a sense of accepting and owning their eventual settlement.

—It has a tendency to mitigate tensions and build understanding and trust among disputants, thereby avoiding the bitterness which may follow adjudication.

—It may provide a basis by which parties negotiate their own dispute settlements in the future.

—It is usually less expensive than other processes.

But mediation, too, has potential shortcomings. It can be time consuming, lack an enforcement mechanism when done outside the courts (although agreements may be enforceable as contracts), and depend on the voluntary participation of all parties to a dispute and their willingness to negotiate in good faith. It does not always result in an agreement and, therefore, the resolution of a dispute.

It also raises a series of considerations related to the role of the mediator. In general, mediation works best when the parties have a rough parity of power, resources, and information. But, what is the responsibility of the mediator if there is a significant power imbalance among parties or if one party is uninformed or misinformed about the law or facts needed to make a sound decision? Should the mediator, or anyone else, have the responsiblity to make certain an agreement has a principled basis and is not reached out of ignorance or fear? Should a mediator refuse to take part in resolving a dispute if one or another party may be hurt in the process or have their confidences disclosed? What are the consequences if the mediator becomes interventionist and is not perceived as impartial? In sum, assuming they can be defined, how are the ethics of the mediator assured? And, what is the appropriate role for the lawyer when a client is attempting to reach a mediated settlement?

Beyond the specifics of arbitration and mediation, there are general concerns about nonjudicial methods of dispute resolution. These methods, which might reach settlements without the use of lawyers or counselors, may lead disputants to make choices they would avoid if they were better informed. This is an area of particular concern related to women, the poor, the elderly, persons for whom English is a second language, and other classes of disputants who are traditionally less powerful or less skilled at negotiation than their opponents. Further, nonlitigative methods may merely give the appearance of resolving some disputes while avoiding a finding of more extensive liability or leaving fundamental issues unsettled (e.g., an individual settlement in a products liability case while the company keeps manufacturing the defective part or an individual settlement of a discrimination complaint while the organization continues the prohibited practice).

Nonlitigative methods usually carry with them no element of coercion to force participation in settling a dispute, so they may not be practical for a large category of disputes. This is particularly so for the disenfranchised trying to pursue disputes with the government, because government agencies may not agree to a voluntary process. Further, settlements reached through nonlitigative methods of dispute resolution may lack enforceability.

It should also be noted that efforts to settle disputes may not be productive if the parties have not sufficiently narrowed the issues, developed the facts, and concluded that compromise is in their best interests. Disputes somehow must be ripe for resolution before they can be settled satisfactorily. Table 3 in Appendix 1 notes these and other potential problems in using nonlitigative methods.

DISPUTE RESOLUTION PRINCIPLES

Comparison of various methods of dispute resolution raises complex issues. More empirical information is needed before any definite statements can be made about the appropriateness of one method over another in a particular kind of dispute. The Panel was able to conclude, however, that there are a number of major criteria by which a dispute resolution mechanism can be judged:

1. **It must be accessible to disputants.** This means that the forum for resolution should be affordable to disputants as well as accessible in terms of physical location and hours of operation. Parties should be comfortable in the forum and feel that it is responsive to their interests.

2. **It must protect the rights of disputants.** In cases where there is a parity of resources, influence, and knowledge, this may not be a concern. But where one party is at a disadvantage, his or her rights may be jeopardized by choice of the forum. For instance, the poorer litigant may not be able to afford full discovery, expert witnesses, etc. Similarly, without counsel in a mediation, a party may unnecessarily forfeit rights.

3. **It should be efficient in terms of cost and time** and, so, may have to be tailored to the nature of the dispute. Time is very important in many instances, and the forum for settlement should respond to this imperative. For example, it is obviously vital to the elderly that their disputes be settled quickly. Some disputes, especially those involving highly charged emotional

issues, may take some time to settle; factual disputes may be more amenable to expeditious handling.

4. It must be fair and just to the parties to the dispute, to the nature of the dispute, and when measured against society's expectations of justice.

5. It should assure finality and enforceability of decision. Although the mechanism itself can discourage appeals, it may be the disputants' belief that the process was fair that will be the principal component of finality. In coercive situations, due process concerns will require that there are proceedings for review of decisions.

6. It must be credible. The parties, their lawyers, and other representatives must recognize the forum as part of a legitimate system of justice. People who practice the alternatives, especially as judicial adjuncts, must be competent, well-trained, and responsible. Society, too, must have faith in the alternative and recognize its legitimacy.

7. It should give expression to the community's sense of justice through the creation and dissemination of norms and guidelines so that other disputes are prevented, violators deterred, and disputants encouraged to reach resolution on their own.

The Panel recognized that it is unlikely that any dispute resolution mechanism will be equally strong in all of the seven criteria. Rather, choices will have to be made concerning which qualities are the most essential with respect to particular kinds of disputes. It is through this process of decisionmaking and monitoring outcomes that some assessment can be made of the real implications of various forms of dispute resolution. For instance, one could argue that mediation is a better approach to resolving property and custody issues in a divorce because of the interest in facilitating a workable long-term relationship; however, some fear that without counsel present during negotiation, a woman, unused to asserting herself, will settle for less than she would be awarded through judicial proceedings; others observe that courts are generally biased against awarding custody to men. These differences in perspective demonstrate that there is much information needed before dispute resolution methods for particular kinds of disputes can be prescribed.

It should also be noted that an assessment of what is at stake--and, therefore, what forum to use--might be different from the perspective of the disputants than if viewed from the larger societal perspective. For instance, what outsiders might term as a minor dispute may be of major importance to at least one of the disputants. Further, just because many dollars are at stake does not mean that a more formal process is required. There is no automatic correlation between the money involved in a dispute and the forum that is appropriate. Rather, it is the nature of the dispute that is important. For example, a contest over $200 in back rent may be as important to the tenant as a $2 million contract suit is to a large corporation, and they may be of similar complexity to resolve.

INSTITUTIONALIZING DISPUTE RESOLUTION METHODS

Central to the discussion of dispute resolution are issues related to institutionalizing methods of non-judicial dispute resolution--financing them, implementing them, and defining their relationship to each other and to the courts. It is in this area that more questions than answers surface. Our ability to address these concerns is limited until we know more about existing and proposed mechanisms and can assess the usefulness and implications of various approaches to resolving particular disputes. For example, although there is a growing popularity of court-annexed arbitration programs, some experience shows that about the same percentage of cases get settled without the required arbitration as with it; while the arbitrated cases tend to be settled faster, the cost of settlement may now include the arbitrator's fee. Analysis is further limited because there are, as yet, no measures of impact and effectiveness that allow comparison of different dispute resolution techniques.

Among the areas addressed by the Panel and requiring further inquiry are the following:

Funding and Incentives for Alternatives

Financing alternative means of dispute resolution will likely continue to be a problem. Those that now exist are funded from a variety of sources, including user fees, foundation and corporate support, and government appropriations. Many programs are financially insecure.

Some programs may be funded privately from user fees when all parties to a dispute can afford to pay, as in inter-corporate disputes. Arbitration has been funded this way historically, and some of the newer programs, such as the mini-trials and rent-a-judge, are similarly supported. But the alternatives will need public funding if they are to gain widespread use. Most probably they will have to be appended to the courts and funded from judicial appropriations or from fees generated from litigation.

In addition, however, it may be desirable to fund mechanisms to help resolve disputes that do not, or should not, reach the level of a formal complaint. An example of this might be a dispute resolution center where an elderly resident could take a complaint with a nursing home or a neighbor could take a complaint about noise. It may also be desirable to have a publicly funded program that is not publicly controlled when the government itself may be a party to a dispute or when the subject matter may be inappropriate for government involvement, such as some areas of controversy and political or First Amendment issues.

If alternative methods of dispute resolution are to gain widespread acceptance, incentives will have to be found both to establish appropriate programs and to use them. Theoretically, the best incentive would, of course, be that the mechanism dispenses better justice—according to the criteria enumerated earlier—than other more traditional means. Nonetheless, it is likely that there will be resistance to these new vehicles. Incentives will have to be developed for lawyers and clients alike to ensure the acceptance and use of alternatives to litigation. In addition, the programs' financing will remain precarious unless largely publicly supported.

If that is the case, officials will have to be persuaded that establishing nonlitigative dispute resolution programs is in the public interest: that the programs save the public money in the long run; reduce demands on the courts and government personnel; reduce the time and overhead costs required to settle disputes; and increase public satisfaction. Alternately, even without a determination of cost savings, the government may conclude the alternatives do indeed provide a better path to justice and should be established for their own sake.

Dispute Resolution and the Legal Profession

Many practical aspects of the legal profession as it is now structured need to be considered in conjunction with any strategy to improve courts and to increase use of alternatives to the court.

Lawyers serve as the gatekeepers for disputes. People typically consult with lawyers when they have a controversy that has reached an intolerable stage. As a result, disputants rely on lawyers' advice on the appropriate path to follow for resolving their problem. Currently, law school curricula take inadequate account of the fact that lawyers spend more time negotiating than litigating. What is needed, therefore, is to train lawyers in the less adversarial negotiating skills and in how the various alternative methods of dispute resolution work. In that way, they can assess the optimal path to take to resolve a conflict and may not automatically be inclined toward court.

We also need to look at the economics of the legal system to see if that breeds an excessive dependence on litigation to resolve disputes. For example, the three major ways of financing attempted resolution of a dispute--the hourly charge, contingency fee, and fixed fee--shape how a dispute might be resolved. It has also been suggested that various forms of fee shifting might encourage parties to pursue a particular course of dispute resolution. Some examples that might be considered are: shifting either attorney's fees or the cost of the forum, or both, to the loser; assessing additional costs if an offer of settlement is rejected and the decision does not reflect a significant improvement for the disputant; increasing the cost of appeal if the appellant's position is not improved through appeal. It should also be noted, however, that these changes might have a substantial effect on discouraging some cases that society views as important. For a number of reasons, the changes should not be implemented before extensive and careful study.

Noting that some attorneys are already uncomfortable with excessive reliance on adversarial approaches, the Panel questioned whether there are modifications of the current incentive structure that would encourage more lawyers to make greater use of dispute resolution alternatives. It was suggested that some attorneys may specialize in alternatives to litigation. This approach may appeal to some portion of the large number of recent law school graduates as they try to differentiate their skills. The legal professional must also be encouraged to look to the future and to explore pre-paid legal clinics, legal insurance, and other mechanisms to make legal services affordable to a larger portion of the population.

Ways must also be found to prevent some lawyers from abusing the litigation process by excessive reliance on courts, by filing frivolous appeals, and by providing inadequate service to their clients. Part of this problem is that neither the parties themselves nor the lawyers bear the full costs of processing cases that have a very small chance of success. Indeed, there are incentives on the lawyer's part to pursue them: the lawyer is paid for the effort, and it is arguably unprofessional not to pursue any available avenue. Thus, means must be found to have the disputant and the lawyer make value choices as to whether the process should be pursued. When the process is abused, proper sanctions should be imposed.

The Relationship of Alternatives to the Courts

If nonlitigative methods of dispute resolution are to gain broad use, participation may have to be compulsory. The disputing party without influence may not be able to summon other parties to a nonlitigative forum if it is voluntary. It may be appropriate in some instances to require parties to use non-binding arbitration or mediation before submitting certain types of dispute to litigation. For example, a court could require a complainant against an auto company to submit the dispute to a consumer action panel (CAP) before the court would hear it. A creditor could be required to attempt to reach settlement through mediation prior to going to court. Divorce cases could be referred initially to mediation for settlement of custody and property issues.

Some suggest that judges need increased statutory authority to invoke this broader use of alternatives. Certainly, these examples add more weight to the suggestion that society pay for options to the court just as it pays for the courts. Further, requiring the use of forums other than the courts may raise constitutional due process questions unless disputants eventually could obtain a court hearing. Such hearings could either be narrow appellate-type reviews or trials de novo.

To reduce the pressure on judges, adjuncts--such as masters, referees, and magistrates—could be used more widely, even in highly complex litigation, and they could engage in a broader range of dispute resolution techniques.

Whether the use of alternative processes is mandatory or not, it has been suggested that a centralized system be established to screen complaints and refer them to appropriate dispute resolution mechanisms. This is an idea worth examining and testing, as the American Bar Association has been advocating through experimentation with "multi-door courthouses."

Alternatives and the Public

Public acceptance of the full range of dispute resolution methods depends, in part, on acceptance of people who provide these services. This raises questions of professional responsibility, ethics, and accreditation. Should it be assumed that practitioners have to be lawyers? Is it the unauthorized practice of law, as some bar associations assert, for practitioners other than lawyers (social and health care workers or community volunteers, for example) to serve as mediators? There are a number of professional codes of ethics which have been debated extensively over the years and which may need revision to keep up with new developments in this field.

Because some nonlitigative methods are not well known to large segments of the general public (including the legal profession), education of potential users about these methods and removal of barriers to their use are important steps in the institutionalization process. Part of this involves accurately differentiating techniques from each other, something not currently done by the press or the public.

Many disputes are already handled in tribunals within the community and internal to a number of institutions--schools, churches, trade groups, businesses, for instance. There may be potential for enhancing their ability to resolve disputes more effectively and for extending their responsibilities to include new areas of concern. In fact, widespread use of alternative methods of dispute resolution is critically dependent on their acceptance by existing institutions and at the grassroots level generally. It is when disputes are not resolved at these levels that people turn to lawyers and the law.

FUTURE DIRECTIONS

To date, concern with problems of the courts and with the establishment of alternative dispute resolution mechanisms has come primarily from judges, court administrators, dispute resolution practitioners, a few lawyers, academicians, and special-interest groups. However, the success that various methods of dispute resolution will have in reducing court caseloads, minimizing cost and delay, increasing public satisfaction, and contributing to the health and productivity of society is directly related to the extent that they are well defined, widely understood and supported, adequately funded, used in the appropriate circumstances, evaluated, and modified as necessary. These are objectives that practitioners and scholars cannot achieve alone, but which will also require the participation of users, elected officials, and the general public.

It was with this understanding that the Panel formulated its recommendations to further two basic objectives:

- To ensure that dispute resolution mechanisms operate in the public interest, including that they

  —are accessible to disputants;

  —protect the rights of disputants;

  —are efficient in terms of cost and time;

  —are fair and just;

  —assure finality and enforceability of decision;

  —are credible; and

  —express the community's sense of justice.

- To increase public awareness of dispute resolution so that it becomes an important part of the public policy agenda for the country.

As the Panel members considered the principles which should guide the development of systems of dispute resolution, they expressed frustration with the limits of available information. Clearly, there is a great deal of activity within the field. There are more than two hundred neighborhood justice centers; a range of corporate innovations (mini-trials, rent-a-judge, etc.); family, divorce, and child custody mediation; programs attached to the courts; methods of deciding public policy disputes (such as annexation, allocation of block grants, siting of hazardous facilities, etc.); regulatory reform; and well-known, established programs such as labor-management arbitration, the Community Relations Service, and the Federal Mediation and Conciliation Service.

But very little of the experience with these programs has been documented. The information that does exist is fragmented and housed in many separate places. The result is that, while jurisdictions have problems in common, there is no mechanism for finding out what has been tried elsewhere and with what success. Moreover, dispute resolution methodologies are developing in various substantive areas with little cross-fertilization. As a result, knowledge, experience, and resources are wasted.

Thus, better information is necessary for the kinds of analyses that will determine the impact of different dispute resolution approaches, and assess how they measure up against the public policy criteria listed earlier.

This information must be disseminated to a number of special target audiences—some of which are not yet aware that dispute resolution should be among their concerns. Development of this interest and better understanding can come, in part, through education of the media. Further, information must be specially tailored to the audience--researchers have different needs and interests than policymakers; the general public has different concerns than does the legal profession.

The Panel concluded that future action should emphasize experimentation, evaluation, and dissemination of information. The Panel members suggested a comprehensive and integrated strategy that focuses on:

--Pilot programs and research to test various approaches to, and assumptions about, dispute resolution;

—Centralized collection, analysis, and dissemination of information on dispute resolution options; and

—Efforts to expand public awareness and debate on dispute resolution.

The Panel identified a number of specific initiatives to advance the examination and use of dispute resolution alternatives:

- Resource Center or Clearinghouse - A central location, in or out of government, should be established to collect, analyze, and disseminate information on dispute resolution. This information is relevant to the concerns of a wide range of people and should be presented in different ways depending on the needs of the audience: dispute resolution practitioners, potential disputants, possible funders or sponsors of programs, educators, legislators, researchers, the bar, the media, and the general public. Information must be readily available to localities and at little or no cost. Computer networking, production of bibliographies, newsletters, topical analyses, and a technical assistance capability are program components to be considered.

- Experimental Programming and Research - There is a need to inventory existing dispute resolution mechanisms and to establish new pilot efforts to determine what works, what does not, and what characteristics seem to be associated with success and failure. There should be efforts to identify model programs which can be replicated. There are many concepts which warrant testing. Based on what is known, they may seem like good ideas; and yet, without careful research, their actual impact can only be guessed.

- Creation of State Committees - Special committees of state bars could be established to study dispute resolution. Advice and information could be provided to the states through a mechanism established at the federal level.

- National Conference on Dispute Resolution - A national conference could be scheduled to focus public attention and generate debate on dispute resolution in the United States. It could provide essential information on what is happening in many areas and the attendant academic analysis; reflect the concerns and interests of the government in the area; establish important networks and coalitions; stimulate local initiative; and heighten the public's interest in the subject. The Panel observed that for a conference to maximize its impact, it must be part of a longer term effort which includes collection of information, preparation of materials, and the capability for follow-up.

- Legal Professional Education - This could involve collaborative efforts among the existing continuing legal education programs, the American Bar Association, and foundations to sponsor seminars and short courses for lawyers interested in improving their negotiating skills. Bar associations and judicial training programs should be similarly encouraged to include alternative dispute resolution methods in their programs. Law school curricula should incorporate less adversarial and nonlitigative approaches to dispute resolution.

- Outreach to Other Professional Associations - There is a wide range of special target audiences who sponsor their own annual meetings and training seminars at the local, state, and national levels. Sessions on dispute resolution could be developed and offered for inclusion in their programs. This approach would considerably increase knowledge about and interest in dispute resolution among a diversity of groups of the population.

- Television and Radio Programming - Programs on specific substantive areas in dispute resolution and the topic in general would make a significant contribution to public education and awareness.

- Hearings - To generate national attention and increased commitment to alternatives, congressional committees could hold hearings on the need for a broad approach to dispute resolution.

This is only a partial listing of possible strategies to fully develop and effectively disseminate information on dispute resolution. As suggestions, they are based on the recognition that interest and activity in the field are not enough. Careful inquiry, continual policy analysis, and public involvement are needed to ensure that new initiatives move society closer to having a system of dispute resolution that better reflects the commitment to justice for all.

APPENDICES

Appendix 1: Tables

General Observations on the Comparison and Evaluation of the Various Dispute Resolution Mechanisms

- Dispute mechanisms do not exist in isolation, but in close proximity to one another. They interact with and influence one another. Thus, for example, many mechanisms that work by agreement depend on the threat of resort to institutions with coercive powers. Much of what coercive institutions do, in fact, is to induce and ratify agreements between disputants.

- We usefully distinguish pure types like adjudication and mediation, but institutions usually do not operate in accordance with a single prototype. In practice, these types are combined, and much dispute processing deviates from the avowed prototype. This is particularly true of courts, where what starts as adjudication may end up as a form of mediation. And, generally, the mechanisms employing third parties with the power to make binding decisions often create a setting for negotiations between the disputants.

- Each of the types listed on the tables that follow is a composite, spanning a wide range of actual instances. For example, arbitration includes court-annexed arbitration, arbitration by standing bodies of experts within trade associations, commercial arbitration by ad hoc arbitrators supplied by the American Arbitration Association, etc. Hence the list of qualities associated with a particular mechanism can only be general and suggested and must be reassessed in relation to any specific stance of the type.

- In accounting features as strengths (advantages) or weaknesses (disadvantages), we should recall that this depends on what we want to achieve. For example, absence of a constraint to decide according to pre-existing rules may be accounted an advantage if we seek primarily resolution of the dispute at hand but may be a disadvantage if we seek to set a precedent for resolution of large numbers of claims or to forward public policy embodied in a rule.

- We must examine the advantages and disadvantages of the alternative mechanisms in both the public and private sectors. In seeking such comparisons, we must avoid false comparison between the ideal functioning of one institution and the actual functioning of another.

Table 1 - Some Major Criticisms of the Traditional Court System of Dispute Resolution

2 - Current Efforts to Improve Dispute Resolution

3 - Some Criticisms of Alternative Methods of Dispute Resolution

4 - Advantages and Disadvantages Associated with Dispute Resolution Mechanisms

5 - Partial Listing of Characteristics that May Argue for a Specific Dispute Resolution Option

TABLE 1: Some Major Criticisms of the Traditional Court System of Dispute Resolution

COST, DELAY

- the process is expensive; costs often exceed benefits
- litigation does not provide timely resolution of the dispute; delay imposes additional costs
- in the aggregate, the process consumes resources that could be applied to solve the problem (e.g., compensating victims)

ACCESS, PARTICIPATION

- court processes are mystifying and difficult to understand
- using courts requires employment of expensive intermediaries
- differences in knowledge of the system and in ability to bear costs, delay and uncertainty create inequities between parties

INAPPROPRIATENESS OF FORUM

- courts may lack expertise in the subject matter of the dispute
- courts transform disputes in ways that obscure the genuine issues between parties
- courts may be unable to give a remedy that addresses the underlying causes of the dispute
- the adversary setting polarizes parties and deflects them from the search for an optimal solution

WIDER EFFECTS

- adversarial nature of proceedings disrupts continuing relations between parties
- court decisions may channel energy to preparation for further adversary encounters rather than preventive action/aggregate problem solving

TABLE 2: Current Efforts to Improve Dispute Resolution

A. Reforming the Courts

1. Improved administration of courts — e.g., efficient use of judge time
2. Improved management of cases — e.g., limited continuances
3. Reform of procedures — e.g., control of discovery
4. Diversion to simplified and expedited procedures -- e.g., small claims or arbitration
5. Requirement of preprocessing — e.g., screening panels
6. Settlement facilitation — e.g., at pretrial conferences

B. Creating forums separate from the courts

7. Labor management dispute institutions -- arbitration, mediation, grievance procedures
8. Arbitration of commercial disputes
9. Private judging -- e.g., the "mini-trial," "rent-a-judge"
10. Locally-based dispute resolution — e.g., neighborhood justice centers
11. Media-sponsored complaint handling -- e.g., "action lines"
12. Industry (or individual firm) sponsored complaint programs -- e.g., Consumer Action Panels (CAPs)
13. Grievance procedures within institutions -- e.g., hospitals, prisons, schools, etc.
14. Ombudsmen
15. Mediation of large scale multi-party controversies -- e.g., environmental, land use, and community disputes
16. Divorce mediation
17. Policy consensus-building programs -- e.g., National Coal Policy Project, Negotiated Investment Strategy

C. Systemic changes

18. Delegalization — e.g., no fault compensation systems
19. Regulatory innovations — e.g., the "bubble" approach to air-quality control
20. Enhancing the ability to avoid or handle disputes -- lay education, do-it-yourself, low-cost legal clinics

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Adapted from Marks, Szanton & Johnson, Taking Stock of Dispute Resolution: An Overview of the Field, commissioned by the National Institute for Dispute Resolution, (1981)

TABLE 3: Some Criticisms of Alternative Methods of Dispute Resolution

COST

- may not save significant time or money
- lack of finality may increase expense and time

ACCESS

- may not be known to potential clientele
- may not be available except to wealthy disputants

DEFICIENCIES OF PROCESS

- may lack due process and other safeguards
- may not involve needed expertise
- may not redress power imbalances
- may lack finality
- may lack power to induce settlements
- may lack power to enforce its decisions

WIDER EFFECTS

- may hide dispute from public scrutiny
- may be impermeable to public standards
- may not induce preventive solutions
- may pull into system cases that would best be settled elsewhere
- may de-fuse pressure to reform courts
- diversion of larger disputes may remove constituencies vital to the courts
- relegation of smaller disputes to alternatives may increase alienation from courts

TABLE 4: Advantages/Disadvantages Associated With Dispute Resolution Mechanisms

1. Court Adjudication	2. Arbitration	3. Mediation/ Negotiation	4. Administrative Decision-Making	5. Ombudsman	6. Internal Tribunal
- announces and applies public norms - precedent - deterrence - uniformity - independence - binding/ closure - enforceability - already institutionalized - publicly funded	- privacy - parties control forum - enforceability - expeditious - expertise - tailors remedy to solution - choice of applicable norms	- privacy - parties control process - reflects concerns and priorities of disputants - flexible - finds integrative solutions - addresses underlying problem - process educates disputants - high rate of compliance	- defines problems systematically - devises aggregate solution - flexibility in obtaining relevant information - can accommodate multiple criteria	- not disruptive to ongoing relations - flexible - self-starting - easy access	- privacy - responsive to concerns of disputants - enforceability
- expensive - requires lawyers and relinquishes control to them - mystifying - lack of special substantive expertise - delay - time-consuming - issues redefined or narrowed - limited range of remedies - no compromise - polarizes, disruptive	- no public norms - no precedent - no uniformity - lack of quality - becoming encumbered by increasing "legalization"	- lacks ability to compel participation - not binding - weak closure - no power to induce settlements - no due process safeguards - reflects imbalance in skills (negotiation) - lacks enforceability - outcome need not be principled - no application/ development of public standards	- no control by parties - not independent - not individualized	- not enforceable - no control by parties	- not independent - no due process safeguards - not based on public norms - may reflect imbalance within organization

TABLE 5: Partial Listing of Characteristics That May Argue For One Or Another Type Of Mechanism As Appropriate

	Adjudication	Arbitration	Mediation/Negotiation
ARGUES FOR	- need to create a public norm	- high volume	- desire to preserve continuing relations
	- need to offset power imbalance	- premium on speed, privacy, closure	- emphasis on future dealings
	- need for decision on past events		- need to avoid win-lose decision
	- need to compel participation		- premium on control by disputants
			- multiple parties and issues
			- absence of clear legal entitlement
ARGUES AGAINST	- high volume, low stakes	- need for precedent	- need to compel participation
	- continuing relations		- need to enforce agreements
	- need for speedy resolution		- need to create a public norm

Appendix 2: Lexicon

Some new terms and the ambiguous use of old ones characterize the terminology being used to describe innovative conflict resolution processes. For example, the word "mediation," traditionally viewed as a formal, structured process, is now being used by some to describe any effort by a third-party neutral to bring disputants to a voluntary settlement of their differences. Others have coined phrases such as "Rent-a-Judge" to describe a variation of the arbitration process. The following is intended to clarify some of the common terminology in the field of alternative dispute resolution.

Alternative Dispute Resolution mechanisms or techniques generally are intended to mean alternatives to the traditional court process. They usually involve the use of impartial intervenors who are referred to as "third parties" (no matter how many parties are involved in the dispute) or "neutrals." Some define Alternative Dispute Resolution more broadly to mean finding better ways to resolve disputes, including those that have not reached--and may never reach—the courts or other official forums. Others place the emphasis specifically on the need for ways to alleviate the burden on courts.

Alternative dispute resolution is not a new concept to the judiciary. Many states encourage and utilize **Diversion** programs which remove less serious criminal matters from the formal administration of justice system. Most civil cases are settled before going to trial by using a variety of techniques to bring about voluntary settlements including **Pre-trial Settlement Conferences**, mediation by magistrates and, at times, mediation in chambers by the judge.

Arbitration, widely used in commercial and labor-management disagreements, involves the submission of the dispute to a third party who renders a decision after hearing arguments and reviewing evidence. It is less formal and less complex and often can be concluded more quickly than court proceedings. In its most common form, **Binding Arbitration**, the parties select the arbitrator and are bound by the decision, either by prior agreement or by statute. In **Last Offer Arbitration**, the arbitrator is required to choose between the final positions of the two parties. In labor-management disputes, **Grievance Arbitration** has traditionally been used to resolve grievances under the provisions of labor contracts. More recently, **Interest Arbitration** has been used when collective bargaining breaks down in the public sector, where strikes may be unlawful.

Court-Annexed Arbitration is a newer development. Judges refer civil suits to arbitrators who render prompt, non-binding decisions. If a party does not accept an arbitrated award, some systems require they better their position at trial by some fixed percentage or court costs are assessed against them. Even when these decisions are not accepted, they sometimes lead to further negotiations and pretrial settlement.

Conciliation is an informal process in which the third party tries to bring the parties to agreement by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement, either informally or, in a subsequent step, through formal mediation. Conciliation is frequently used in volatile conflicts and in disputes where the parties are unable, unwilling or unprepared to come to the table to negotiate their differences.

Facilitation is a collaborative process used to help a group of individuals or parties with divergent views reach a goal or complete a task to the mutual satisfaction of the participants. The facilitator functions as a neutral process expert and avoids making substantive contributions. The facilitator's task is to help bring the parties to consensus on a number of complex issues.

Fact Finding is a process used from time to time primarily in public sector collective bargaining. The Fact Finder, drawing on both information provided by the parties and additional research, recommends a resolution of each outstanding issue. It is typically non-binding and paves the way for further negotiations and mediation.

Mandated Settlements and Negotiated Settlements. Alternative dispute resolution techniques involving the use of neutrals are often divided into two categories: (1) settlements negotiated by the disputants and (2) settlements mandated by a third party. A more recent development has been the merging of the two; if the parties are unable to resolve their differences voluntarily, the third-party is authorized to dictate the terms of the settlements (see Med-Arb below).

Med-Arb is an innovation in dispute resolution under which the med-arbiter is authorized by the parties to serve first as a mediator and, secondly, as an arbitrator empowered to decide any issues not resolved through mediation.

Mediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences. Mediation is usually a voluntary process that results in a signed agreement which defines the future behavior of the parties. The mediator uses a variety of skills and techniques to help the parties reach a settlement but is not empowered to render a decision.

The Mini-Trial is a privately-developed method of helping to bring about a negotiated settlement in lieu of corporate litigation. A typical mini-trial might entail a period of limited discovery after which attorneys present their best case before managers with authority to settle and, most often, a neutral advisor who may be a retired judge or other lawyer. The managers then enter settlement negotiations. They may call on the neutral advisor if they wish to obtain an opinion on how a court might decide the matter.

The Multi-Door Center (or Multi-Door Court House) is a proposal to offer a variety of dispute resolution services in one place with a single intake desk which would screen clients. Under one model, a screening clerk would refer cases for mediation, arbitration, fact-finding, ombudsman or adjudication. The American Bar Association plans to experiment with multi-door centers in three cities in 1983.

Negotiated Investment Strategy is a mediation process which has been used on a limited basis to bring together federal, state and local officials and community members to resolve differences, disputes and problems related to the allocation and use of public resources.

Neighborhood Justice Center (NJC) was the title given to the three local dispute resolution centers (Atlanta, Kansas City and Los Angeles) funded by the Department of Justice in an experimental alternative dispute resolution program in the mid 1970's. That experiment contributed to the start of about 180 local centers now operating throughout the country under the sponsorship of local or state governments, bar associations and foundations. NJC's deal primarily with disputes between individuals with ongoing relationships (landlord-tenant, domestic, back-yard conflicts, etc.) Many draw their caseloads from referrals from police, local courts or prosecutors' offices with which they affiliated. The dispute resolution techniques most often offered by the centers are mediation and conciliation. Some centers employ med-arb. Referrals to other agencies are a common feature. Many centers earn some income providing training and technical assistance services. They are also known as Community Mediation Centers, Citizen Dispute Centers, etc. (See ABA's Dispute Resolution Program Directory)

An Ombudsman is a third party who receives and investigates complaints or grievances aimed at an institution by its constituents, clients or employees. The Ombudsman may take actions such as bringing an apparent injustice to the attention of high-level officials, advising the complainant of available options and recourses, proposing a settlement of the dispute or proposing systemic changes in the institution. The Ombudsman is often employed in a staff position in the institution or by a branch or agency of government with responsibility for the institution's performance. Many newspapers and radio and television stations have initiated ombudsman-like services under such names as Action Line or Seven on Your Side.

Public Policy Dialogue and Negotiations is aimed at bringing together affected representatives of business, public interest groups and government to explore regulatory matters. The dialogue is intended to identify areas of agreement, narrow areas of disagreement and identify general areas and specific topics for negotiation. A facilitator guides the process.

Rent-a-Judge is the popular name given to a procedure, presently authorized by legislation in six states, in which the court, on stipulation of the parties, can refer a pending lawsuit to a private neutral party for trial with the same effect as though the case were tried in the courtroom before a judge. The verdict can be appealed through the regular court appellate system.

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MAKING
ALTERNATIVE DISPUTE RESOLUTION
WORK:

A Guide for Practicing Lawyers

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HOW ENDISPUTE CAN HELP:

ENDISPUTE provides a full range of dispute resolution and conflict management services. Through offices in Washington, Cambridge, and Chicago, ENDISPUTE:

- Helps parties design and implement alternatives to traditional litigation.
- Provides mediation and other resolution assistance for disputes of all sizes.
- Helps courts and other institutions develop procedures to rapidly and fairly resolve large numbers of disputes arising from a single source, product, or subject matter.
- Assists corporations, government agencies, law firms, and other institutions in reducing the costs of conflict through the better management of disputes.
- Advises corporations and other institutions on the management of their legal function.
- Offers training programs and workshops in negotiation, dispute resolution, litigation decision-making, and legal management.

The overall objective is simple: to cut the costs imposed by disputes of all kinds without impairing the quality of the resolutions achieved.

Dispute Resolution. To create tailored resolution alternatives for individual cases, ENDISPUTE professionals set up procedures yielding faster, less expensive, and better resolutions. ENDISPUTE helps resolve large corporate, commercial, and insurance disputes, multi-party disputes involving public entities, and disputes involving individual tort claimants and small businesses. ENDISPUTE has used minitrials, mediation, settlement conferences, neutral factfinding, arbitration, and hybrids of each to achieve cost-effective resolutions. Recent activities include assistance in disputes arising out of:

- Personal injury, product liability, and other tort matters.
- Malpractice allegations against accounting and law firms.
- Ventures to recycle municipal waste and build mining facilities.
- Patent/antitrust matters in chemical and aerospace industries.
- Antitrust claims arising from price fixing allegations.
- Construction disputes involving several major projects.
- Alleged securities-related improprieties.
- Dissolutions of an investment partnership and a professional firm.

Dispute Management Analysis. ENDISPUTE also assists clients in the better management of disputes, particularly in circumstances involving widespread or complex litigation and multiple parties. Recent activities of ENDISPUTE principals include:

- Helping to develop better procedures for Superfund enforcement and negotiation.
- Helping to resolve the flood of asbestos claims through:
    - Acting as special master to a federal court.
    - Advising another federal court.
    - Helping to design procedures for resolving asbestos claims brought to the Manville Personal Injury Settlement Trust.
- Working to cut an insurer's litigation exposure.
- Reviewing the corporate legal function for an investment firm.
- Advising corporations on the use of alternate dispute resolution techniques.

Dispute-Related Training. ENDISPUTE provides training in negotiation, dispute resolution techniques, litigation decision-making and cost-effective legal management. ENDISPUTE principals have designed and participated in more than 200 workshops and other training programs for corporations, courts, law firms, and federal and state agencies.

ADR: MAKING IT WORK

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ADR: MAKING IT WORK

I. What is ADR?

Alternative dispute resolution -- or ADR -- processes are those other than the most-used primary processes of adjudication and direct negotiation. They seek to avoid the uncertainty, unpredictability, delay, and high transaction costs which are key problems of traditional litigation.

- **ADR processes can be non-binding or binding. They usually involve a neutral.**

  Some ADR processes -- such as mediation and the minitrial -- are non-binding. They facilitate settlement by modifying the negotiation process to increase the likelihood of agreement.

  A mediator, for example, may calm the emotionalism surrounding a dispute. A minitrial's neutral advisor provides a non-binding opinion about the legal and practical strengths and weaknesses of the parties' cases, and thus often helps break a negotiation impasse stemming from different views of likely in-court outcome.

  Other ADR processes -- such as arbitration -- are binding. Arbitration often can provide a faster and less expensive decision resolving a dispute than would be obtained through traditional in-court adjudicatory processes.

- **ADR processes can be implemented by an *ad hoc* arrangement of the parties or through an established forum.**

  The parties to a dispute can agree through an *ad hoc* arrangement to conduct a minitrial, retain a mediator, or hire a former judge to conduct a private settlement conference. ADR processes can be set up with the assistance of an established private forum such as ENDISPUTE. They also can be court-annexed, as in the voluntary and mandatory non-binding arbitration programs in many state and federal jurisdictions.

II. Making the ADR Decision

An ADR process often can assist disputants in reaching a faster, less expensive, and more appropriate resolution than if they relied on negotiation and adjudication alone. In considering ADR, there are two key questions:

- **Does the dispute have ADR potential?**
- **If so, what is the best ADR process?**

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Answering these questions requires both a partisan and a joint analysis. Each party must assess the dispute to determine whether pursuing ADR is in its best interests. If each party decides independently that ADR may be preferable to litigation, then the parties must jointly decide what procedure is best and negotiate an ADR agreement.

A decision to use ADR may be made either before or after a dispute arises. Often, dispute resolution provisions are included in the contract negotiated by parties to a transaction. If there is no contractual provision or if the dispute arises independent of contract, consideration of the various mechanisms available to resolve a dispute must occur after the dispute arises.

A. Evaluating ADR Potential

Assessing ADR potential from a partisan perspective involves determining:

- **Whether there is a negotiation impasse;**
- **Whether it is in the best interests of each party to seek to break the impasse.**

Several factors must be considered in making these determinations. In complicated disputes, some factors may favor using ADR while others may argue against it.

Factors which may favor pursuing an ADR option include:

- The expense of litigation.
- The unpredictability and uncertainty of a litigated resolution.
- The delay involved in seeking a court decision.

Factors which may work against agreement about the advantages of pursuing an earlier, faster, less expensive resolution include:

- A serious power or economic imbalance between the parties.

  In such circumstances, the party favored by the imbalance may believe it can gain an advantage by pursuing a "how do you like it so far?" approach to litigation.

- A linkage between the lawsuit at issue and other pending or possible suits.

  When the lawsuit at issue is part of a broader dispute, a party may believe that it should spend much more to litigate the case than it is "worth" because of the influence which a settlement would have on the other cases.

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- One party as stakeholder.

  Because able to use the money at issue, a stakeholder party often can gain a net benefit from delay even when litigation costs are considered.

Where one or more of the negative factors is strong enough to override other considerations, it is unlikely that a party will conclude that it is in its interest to agree to an ADR procedure. In most situations, however, even when there are negative factors, there also will be factors favoring at least the exploration of ADR. Rarely is the choice a clear one against even considering ADR.

B. Choosing an ADR Process

1. Binding vs. Non-Binding Options

A key consideration in choosing an ADR procedure is whether the chosen procedure should be binding or non-binding.

a. **Binding Options.** A binding process -- some form of arbitration -- is likely to be appropriate in circumstances where the parties recognize that:

* They are not likely to be able easily to reach any form of negotiated settlement of a dispute, whether the negotiations occur directly among themselves or with the assistance of a neutral.
* The in-court litigation alternative is likely to take longer or be more costly than an agreed-to arbitration procedure.
* There are likely to be advantages to a binding proceeding which is private and presided over by a decision-maker or decision-makers with expertise in the subject matter of the dispute.

Many lawyers who negotiate contracts or who litigate shun arbitration. They assert, for example, that arbitration too often turns into a proceeding which is as time-consuming and costly as litigation, is even less predictable, and too often ends in a compromise award. But such criticisms are better directed at the designers of arbitration clauses and procedures than at arbitration itself. Choosing a binding procedure which will be both timesaving and cost-effective requires the parties or their counsel carefully to tailor the agreement to arbitrate. For example, time limits should be established and the neutral should be explicitly empowered to manage the process to avoid delays and cumulative evidence.

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b. Non-Binding Options. A non-binding process is likely to be appropriate in circumstances where the parties recognize that:

- They have either reached or are likely to reach an impasse in trying to negotiate a settlement directly.
- They can increase the likelihood of breaking such an impasse and achieving a negotiated settlement by:
  - Changing the terms and conditions under which they are negotiating; and/or,
  - Obtaining the assistance of a neutral to help them find an acceptable settlement.

2. Evaluating Barriers To Successful Negotiation

Deciding on an ADR procedure involves identifying the barriers preventing successful negotiations and choosing an ADR option designed to overcome those barriers.

a. Identifying Barriers. Barriers which create negotiation impasses include:

- **Problems of communication.** Negotiation dynamics sometimes make it difficult or impossible for the parties to be honest with each other, either about their views of the facts and law relating to the dispute or about what it would take to settle the dispute.

- **Problems of emotion and lack of trust.** Events leading up to the litigation sometimes sour relationships between the parties and lead each to suspect both the motives and the representations of the other.

- **Problems of the adversary process.** Events of the litigation itself sometimes further exacerbate the hostility of the parties or transform a business dispute into a complicated and multi-faceted legal battle.

- **Problems of differing views of the underlying facts, the applicable law, technical issues, and the likely in-court outcome on one or all issues.** In almost every serious dispute, it is likely that good faith differences will exist between the parties' forecasts of likely outcomes. These differences often create a "settlement gap" that is difficult to bridge.

b. Matching Options to Barriers. After identifying the barriers to resolution of their dispute, some parties may decide that the barriers to successful direct negotiation are insurmountable. If so, they will usually either decide to litigate or choose a binding ADR procedure.

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Other parties may decide that the barriers which they have identified can be overcome. These parties will usually decide on a non-binding ADR procedure.

Each type of barrier can best be overcome or removed by a different form of non-binding ADR procedure. A useful maxim is, where other things are equal, to favor the least complicated approach.

Barriers involving problems of communication and lack of trust can be dealt with, for example, by assisting the parties to negotiate more effectively through the use of:

* A neutral as "confidential listener;"
* A neutral as more traditional mediator who can help break down such barriers by:
  -- Serving as a shuttle diplomat;
  -- Helping to filter the parties' communications with each other;
  -- Pushing the parties to focus on underlying objectives rather than on posturing or staking out a position; and,
  -- Encouraging and assisting in joint problem-solving.

Barriers involving differing views of the law, facts, technical issues, and in-court outcomes can be dealt with, for example, by adding new, relevant, and credible information to the negotiation process through the use of:

* Joint fact-finding;
* A neutral investigator, fact-finder, or expert;
* A settlement conference in which a neutral provides input about the value of the case or the merits of the parties' positions;
* A summary jury trial, in which an advisory jury renders a non-binding verdict;
* A minitrial; or
* A specially tailored "hybrid" procedure.

III. What A Neutral Can Do

A neutral can play three distinct but related roles in ADR:

- Serving as an expert in the ADR process.
- Facilitating negotiations.
- Moving the parties toward a substantive resolution.

A. Providing ADR Process Expertise

Specialized neutral help in choosing and designing an ADR process is unlikely to be necessary or cost-effective for low stakes disputes. Parties to such disputes may wish instead to rely on available ADR information resources. Resources include materials on arbitration rules and procedures,

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model agreements for minitrials, and simplified or specialized arbitration and mediation procedures. Materials can be obtained through organizations such as ENDISPUTE.

As the stakes in dispute and the level of antagonism between parties increase, the potential value of obtaining neutral process expertise also grows. Especially in larger cases, an ADR procedure is less likely to be successful if the parties pay little attention to procedural options and issues or rely completely on standardized procedures promulgated by an ADR forum. An ADR process is most likely to achieve a cost-effective and fair resolution of a high stakes dispute if the parties take care in evaluating ADR options and in negotiating the details of the chosen option. Further, success in these procedural negotiations can provide impetus to the successful resolution of substantive issues.

In such circumstances, a neutral ADR expert can add value by:

- **Getting an ADR process started and keeping it going.** Some parties are reluctant to agree even to a non-binding ADR process, and may view with suspicion any ADR options suggested by another party. This makes direct negotiations about ADR options more difficult. Thus, the retention of a neutral process expert may be the best -- and sometimes the only -- way of getting an ADR dialogue started and keeping it going.

- **Helping to identify and evaluate ADR options.** An ADR process intermediary can bring expertise and experience to the identification and evaluation of ADR options. Knowledge of what has worked and not worked in similar cases can help in identifying ADR options, in fine-tuning the option which seems best, in highlighting areas where difficulties are most likely to arise, and in bringing ADR "precedent" to bear to resolve procedural disagreements.

- **Helping to negotiate details of the process.** Negotiating the details of and implementing the ADR process may be complicated by the same factors which have made direct negotiation difficult or impossible -- lack of trust, emotion, and a fear of giving something away by being too honest. An ADR process expert can deal effectively and efficiently with these and other problems of adversarial negotiations by using the same mediation techniques as might be used by a neutral helping the parties move directly to a substantive settlement. For example, an ADR expert can put a "neutral" proposal on the table after consulting with all parties.

B. Facilitating Negotiations

A neutral can serve as an intermediary to help facilitate communication and effective negotiation of a settlement to resolve the dispute by:

- **Serving as an intermediary in carrying messages between the parties.** In the role of "shuttle diplomat," a neutral can act as the link between the parties which allows for communication of positions. A neutral can help the parties clarify the objectives they wish to achieve through resolution of the dispute. In addition, a neutral can

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help determine whether each party understands the position and objectives of other parties. Further, in situations where pertinent information is confidential, a neutral can act as the keeper of confidences, enabling information to be used in resolution of the dispute without requiring disclosure.

- **Helping to filter the parties' communications with each other.** While performing the role of messenger, the neutral also can act as a filter between the parties. In this role, the neutral is able to defuse tension between the parties and to develop a primarily cooperative rather than a primarily adversarial or vindictive atmosphere.
- **Encouraging the parties to put aside emotions and focus on underlying objectives, not on posturing or staking out a position.** Often a party is too emotionally involved or too adamantly attached to a position to focus on the true underlying objectives it wishes to achieve. A neutral can raise questions in the minds of the parties as to the validity of the positions taken and suggest alternative approaches consistent with the parties' true objectives. Both steps may facilitate agreement.

C. Assisting in Resolution

A neutral can move parties toward a substantive resolution of the dispute by:

- **Suggesting appropriate compromises.** Although agreements in non-binding ADR processes must be the parties', not the neutral's, a neutral can help fashion solutions which seek to reconcile the parties' expressed interests. At best, such a solution will be acceptable to the parties; in many circumstances, it can provide a starting point for further negotiations.
- **Offering non-binding views on the merits.** A neutral can serve as an expert on outcome prediction. For example, a neutral may provide input on how a court or jury is likely to decide the case or suggest an appropriate settlement value, thus helping the parties toward a realistic evaluation of the stakes in dispute. Similarly, a neutral may provide the parties with an assessment of the merits of each party's contentions and thus help the parties identify their own and the other side's strengths and weaknesses. Such opinions -- even though advisory in nature -- can provide a strong incentive to the parties to be both careful and credible in their presentations.
- **Rendering a binding decision.** If the parties agree to accept the resolution reached through an ADR process as binding, a neutral can function as a decision-maker. In this role, a neutral listens to all sides of a dispute and then renders a decision which is binding on the parties.

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Appendix A -- Making the ADR Decision: A Systematic Approach

- *DOES THE DISPUTE HAVE ADR POTENTIAL?*
  - * Is there a negotiation impasse?
  - * Is it in the interests of the parties to seek now to break it?

- *IF SO, WHAT IS THE BEST ADR PROCESS?*

* A binding process may be appropriate where the parties agree:

-- They are not likely to be able easily to reach a negotiated settlement.
-- The in-court litigation alternative is likely to take longer or be more costly than an agreed-to binding procedures.
-- There are likely to be advantages to a binding procedure which is private and presided over by a decision-maker or decision-makers with expertise in the subject matter of the dispute.

* A non-binding process may be appropriate where parties agree:

-- They are not likely to be able easily to reach a negotiated settlement.
-- The in-court litigation alternative is likely to take longer or be more costly than an agreed-to binding procedures.
-- There are likely to be advantages to a binding procedure which is private and presided over by a decision-maker or decision-makers with expertise in the subject matter of the dispute.

* Barriers to successful negotiation include:

-- Problems of communication.
-- Problems of emotion and lack of trust.
-- Problems of the adversary process.
-- Problems of differing views of the facts, the applicable law, technical issues, and the likely in-court outcome on one or all issues.

* Barriers involving problems of communciation and lack of trust may be overcome through the use of a neutral as:

-- Confidential listener.
-- Shuttle diplomat.
-- Mediator.

* Barriers involving problems of communciation and lack of trust may be overcome through the use of:

-- Joint fact-finding;
-- A neutral investigator, fact-finder, or expert;
-- A settlement conference;
-- A summary jury trial;
-- A minitrial; or
-- A specially developed "hybrid" procedure.

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APPENDIX B -- ADR ROADMAP: COMPARING THE PROCESSES

"PRIMARY" DISPUTE RESOLUTION PROCESSES

Adjudication	Arbitration	Mediation/Conciliation	Traditional Negotiation
Non-Voluntary	Voluntary unless contractual or court-centered	Voluntary	Voluntary
Binding subject to appeal	Binding, usually no appeal	Non-binding	Non-binding (except through use of adjudication to enforce agreement
Imposed third-party neutral decision-maker, with no specialized expertise in dispute subject	Party-selected third-party decision-maker, usually with specialized subject matter expertise	Party-selected outside facilitator, often with specialized subject matter expertise	No third-party facilitator
Highly procedural; formalized and highly structured by predetermined, rigid rules	Procedurally less formal; procedural rules and substantive law may be set by parties	Usually informal and unstructured	Usually informal and unstructured
Opportunity for each party to present proofs supporting decision in its favor	Opportunity for each party to present proofs supporting decision in its favor	Presentation of proofs less important than attitudes of each party; may include principled argument.	Presentation of proofs usually indirect or non-existent; may include principled argument
Win/lose result	Compromise result possible	Mutually acceptable agreement sought	Mutually acceptable agreement sought;
Expectation of reasoned statement	Reason for result not usually required	Agreement usually embodied in contract or release	Agreement usually embodied in contract or release
Process emphasizes attaining substantive consistency and predictability of results	Consistency and predictability balanced against concern for disputants' relationship	Emphasis on disputants' relationship, not on adherence to or development of consistent rules	Emphasis on disputants' relationship, not on adherence to or development of consistent rules
Public process; lack of privacy of submissions	Private process unless judicial enforcement sought	Private process	Highly private process

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"HYBRID" DISPUTE RESOLUTION PROCESSES

Private Judging	**Neutral Expert Fact-Finding**	**Minitrial**	**Settlement Conference**
Voluntary	Voluntary or nonvoluntary under FRE 706	Voluntary	Voluntary or mandatory
Binding but subject to appeal and possibly review by trial court	Non-binding but results may be admissible	Non-binding (except through use of adjudication to enforce agreement)	Binding or non-binding
Party-selected third-party decision-maker; may have to be former judge or lawyer	Third-party neutral with specialized subject matter expertise may be selected by the parties	Third-party neutral advisor, often with specialized subject matter expertise	Judge, another judge, or third-party neutral selected by the parties.
Statutory procedure (see, e.g., Cal. Code Civ. Proc. § 638 et seq), but highly flexible as to timing, place and procedures	Informal	Less formal than adjudication and arbitration, but procedural rules and scope of issues may be set by the parties and implemented by the neutral advisor.	Informal, off-the-record
Opportunity for each party to present proofs supporting decision in its favor	Investigatory	Opportunity and responsibility to present proofs supporting result in its favor	Presentation of proofs may or may not be allowed
Win/lose result (judgment of court)	Report or testimony	Mutually acceptable agreement sought	Mutually acceptable agreement sought; binding conference is similar to arbitration
Findings of fact and conclusions of law possible but not required	May influence result or settlement	Agreement usually embodied in contract or release	Agreement usually embodied in contract or release
Adherence to norms, laws and precedent	Emphasis on reliable fact determination	Emphasis on sound, cost-effective and fair resolution satisfactory to both parties	Emphasis on resolving the dispute
Private process unless judicial enforcement sought	May be highly private or disclosed in court	Highly private process	Private process, but may be discovered

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Alternative dispute resolution — Opening doors to settlements —

When it comes to resolving business or environmental disputes, "in this country, there's a widespread belief: 'What the hell, let's file a summons and complaint. That will get their attention, and then we can talk,' " says Peter H. Kaskell, senior vice-president of the legal program at the Center for Public Resources (CPR) in New York City, an organization devoted to developing alternatives to litigation. But, Kaskell points out, "once you're on this adversary track, and the lawyers feel their assignment and professional task is to win . . . the talk comes later, after a lot of expense."

Since the mid-1970s, those costs have risen exponentially. The number of multiparty lawsuits is proliferating at an alarming rate. "It would have been amazing if someone had foreseen 10 years ago the litigation explosion that we have encountered only in the last several years, where you have thousands of claims in a single suit," says Robert H. Sand, assistant general counsel at Allied. "The pileup in the courts that results from all this is very recent news." This new trend is forcing increasing numbers of executives, government officials and environmentalists to seek less expensive, less divisive ways to resolve their differences.

A continuum. The search has led to the development of a whole spectrum of methods, known collectively as alternative dispute resolution (ADR), to defuse adversarial relationships and devise cooperative solutions to business and environmental problems. Those involved in ADR describe dispute resolution techniques as a continuum, with formal, court-directed resolution at one extreme and direct negotiations between sides, with no third party to intervene or mediate, at the other. In between is a panoply of techniques, ranging from those in which a neutral third party acts as a mediator with power to decide the matter and whose decision is binding, to those in which a neutral third party acts as a discussion facilitator without power to render any type of decision.

What these techniques are labeled "depends on whom you talk to," says Milton R. Wessel, general counsel for the Chemical Industry Institute of Toxicology (CIIT), and a vocal advocate of ADR. "There is no dictionary definition of these things. The terms are loose [*box, p. 31*]." Because there is no consensus on just what each form of ADR entails, misunderstandings can arise, says William R. Drake, deputy director of the National Institute for Dispute Resolution (NIDR) in Washington, D. C.

'Unlike a typical negotiation, ADR gives the primary responsibility to businessmen'

In short, says John R. Ehrmann, director of the science and public policy program at the Keystone Center (Keystone, Colo.), a leading ADR organization, "you can really get twisted up in all the jargon and make it more complicated than it needs to be." The bottom line, he believes, is that no matter what buzzword is used, ADR, as a "complement" to the traditional dispute resolution system, "gives people more choices. A company should be able to think through the widest range of choices, not just litigate."

ADR is not just a choice, says Gail Bingham, director of the program on environmental dispute resolution for the Conservation Foundation: it's a choice that gets results. According to Bingham's research, to be published this fall in a book entitled *Resolving Environmental Disputes—A Decade of Experience*, in 133 of 162 disputes that she studied, "78% of all the times that people have attempted" mediation or other ADR techniques to resolve those disagreements, meeting "at least once in a good-faith effort to reach agreement, they reached agreement. Where parties reached agreement," she continues, "80% of the time, they implemented [those accords] fully, 13% partly and [in] only 7% [of the cases] did they fail to implement the agreements."

Cost-effective. ADR can succeed in a wide range of issue areas, including labor disputes, business contracts and even controversial government decisions. Those who have tried and used ADR successfully to settle their differences in all of these areas believe that ADR has more to offer than just bringing the parties to agreement. To begin with, says James V. Kearney, a senior partner in the law firm of Webster & Sheffield (New York City), which uses ADR to resolve some of its most difficult cases, ADR can be an "effective way to control litigation costs and risks." Those costs, notes NIDR's Drake, include not only lawyers' fees, which can run as high as $300/hour, but also "lost investment, lost revenues and inflation."

"Lost opportunities [are] a major cost of litigation," says James F. Henry, CPR's president. "This is particularly true in the chemical industry, which is so reliant on intellectual properties." For example, he recalls, a company "called me some time ago about a patent dis-

Gould: "It's not only the dollars" ADR can save, but also staff time.

Janet Charles

pute in the high-tech area that had them stalemated. They realized that their competitors were six months behind them, and they couldn't remain stalemated two to five years without losing a major economic opportunity."

By using ADR to settle a case, all of these types of costs can be sharply curtailed. In one case settled through ADR by John Gould, another Webster & Sheffield senior partner, the clients "saved [approximately] $4 million" in attorneys' fees alone, assuming, he says, that the case was "going to go through three years for trial and the risk of appeal after that." The savings, he says, "change from case to case," depending on the unique facts of the situation. "But," he concludes, "if you eliminate two years of litigation in a major case, any client looking at that can figure out what that costs."

Less ill will. "It's not only the dollars" that ADR can save, notes Gould. There is also the issue of "the diversion of your staff from ongoing activities." Additionally, ADR allows both sides to get back to doing business with each other more quickly and with less residual ill will than in litigation. "The parties," he explains, "particularly in large corporate deals, frequently want to go back to doing business with each other in the way that they've been doing business for years."

"In many cases," notes Keystone's Ehrmann, ADR "involves the decision makers directly in the conflict resoluton process rather than their representative. Therefore," he continues, "they have the opportunity to build understanding and relationships with the other parties at the table." The next time those individuals sit across from each other over a disputed issue, he says, "they will have a better ability to deal with the situation."

Furthermore, since ADR requires that company executives become involved in resolving the controversy, finding a solution becomes a business objective, rather than just another monkey that lawyers have to shake off a company's back. "It's a structured way of getting senior officers from the companies involved and having them assess both the business reality and the likely legal outcome at the same time," says John T. Subak, group vice-president and general counsel for Rohm and Haas. "It gives an added dimension to the discussions, a balanced view of what the lawsuit

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Alternative dispute resolution organizations addressing the CPI's concerns*

*On environmental disputes, regulatory rule making; government, corporate/business issues. Source: Dispute Resolution Resource Directory, 1984, National Institute for Dispute Resolution, Washington, D.C.

might look like. It puts into one room both the lawyers and the businessmen. But unlike a typical negotiation, it gives the primary responsibility to the businessmen, which is where it belongs."

That is "the message of ADR," contends Kaskell. "When you have a $10 million claim, lawyers talk about money, whereas businessmen can talk about new deals." And, he says, "as disputes often arise out of contracts, this is really a business relation." Unfortunately, concedes Kaskell, despite growing support within the business community, not enough people have heeded ADR's message, and the "use of ADR techniques is far below potential."

ADR's devotees point to several reasons why ADR is not catching on quickly. "A lot of lawyers are reluctant to use these things," notes Wessel. That's because ADR is a relatively new process, says Gould. "Lawyers are afraid that there is a risk that they and their clients will be naive—that they'll go in, and they'll lay their facts on the table, but the other side won't lay its facts on the table." The result, he adds: "The mini-trial [ADR procedure] leads nowhere, because although they go into it with good intentions, it does not result in a settlement, and then they're back in the courthouse and they've already put all their cards on the table."

Also, notes Kearney, "ADR is difficult to arrange when you don't have a relationship upon which to base" the mutual trust that is necessary when parties enter into ADR discussions. For example, he explains, companies that are already doing business together have a vested interest in maintaining that relationship once the dispute comes to an end. Thus they are more likely to enter into ADR than disputants whose first real contact is adversarial, as is the situation in toxic tort cases such as the Agent Orange or Bhopal litigation.

Tit for tat. The nature of the U.S. litigation process is also a factor, asserts Gould. "You have officers at a company to whom the dispute means a great deal. They frequently believe it will affect their careers adversely." Plus, he says, "added to those officers you have lawyers who are involved in the competitive give-and-take of the proceeding," he explains, which can lead to a case of tit for tat. " 'That fellow served me with motion papers on Friday night,' one attorney will say," Gould adds, which means spending the weekend drafting a response. Then, he says, the lawyer will retaliate by saying, "I'm not going to think about talking about alternative dispute resolution for another month until the flow, the momentum is quite good for our side."

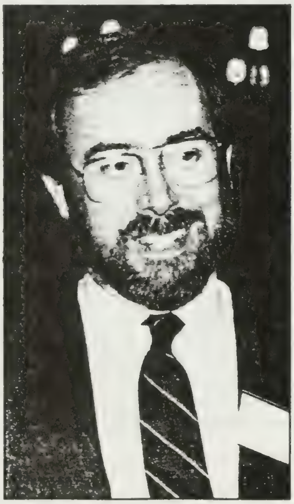
Sometimes, there is fear that the opposition will sense weakness in a case if a company suggests an ADR approach. "The party who raises his or her hand and says, 'Why don't we think of ADR?' looks weak. Consequently, they don't do it," says Gould. Instead, he continues, "they go to court, they file the lawsuit, and they go full steam ahead."

'What is new in the chemical industry' is applying mediation to environmental disputes

At least 113 companies have found what they believe is a way around this roadblock. They are subscribers to a new program, conceived by CPR's legal program, called the "Corporate Policy Statement on Alternative Dispute Resolution," also known as the "ADR pledge." The ADR pledge commits each signatory company to exploring ADR as a method of first resort, if a dispute arises between companies on the subscriber list. To subscribe, the chief executive officer (CEO) and chief legal officer of the corporation must sign the agreement. If no accord can be reached, then they are free to take their grievance to court.

"This relieves the onus of being the first to propose settlement discussions," says CPR's Kaskell. "The practical effect of the statement," explains Robert A. Butler, chief litigation counsel for Union Carbide, one of the signatories, "is that any company that participates in the pledge process can and will raise ADR without fear that it will be regarded as a sign of weakness. It also gives companies enhanced confidence and encouragement that if they raise ADR as a possibility it will be considered."

Drake: ADR must become more widely accepted.



The ADR pledge can also be a way to nip litigious behavior in the bud within one's own organization, elaborates Kaskell. He notes that "the request to initiate litigation typically does not come from the CEO, but from other executives, group presidents, divisional general managers. Often, those people are younger and more bellicose and closer to the situation—and more emotionally involved." The company's general counsel, though, has experienced the headaches a major lawsuit between two or more companies involves. If that general counsel has a statement signed by the CEO that the firm will use ADR when a dispute arises, he is, Kaskell says, "in a perfect position to say, 'This is against company policy. We have to try to work this out first.' "

No sign of weakness. Over the course of 1984 and early 1985, he says, "the great majority" of CPR's membership has subscribed to the pledge. Kaskell believes that signing the pledge has not just been a paper promise. There have "been general counsels who have indicated that they've used our pledge as a basis to say to other companies, 'Let's sit down and talk,' " reports Kaskell. "I've even been told of situations," he continues, in which a company that has signed the pledge, "in a dispute with a company which they knew full well had not signed," has used it to "smooth the way, to open the door to discussions" by asking the other side, " 'We've adopted this policy—have you?' " What that posture does, says Kaskell, is show the other side that " 'we'll talk settlement with anyone—and it isn't a sign of weakness.' "

Much of industry's support, says Kaskell, was drummed up by the Chemical Manufacturers Assn. (CMA) through a letter sent by its president, Robert A. Roland, to CMA's members, urging them to sign the pledge. CMA's position, says David F. Zoll, CMA's vice-president and general counsel, is that "ADR has merit in its own right. If our industry is seen as generally inclined to consider ADR in intercorporate disputes, that reputation may have a spillover effect when we deal with Washington issues in convincing people that we are serious about trying to cooperatively solve

Alternative dispute resolution: A lexicon

Alternative dispute resolution (ADR) mechanisms or techniques generally are intended to be an alternative to the traditional court process. They usually involve the use of impartial intervenors referred to as third parties (no matter how many parties are involved in the dispute) or neutrals. Some define ADR more broadly to mean finding better ways to resolve disputes, including those that have not reached—and may never reach—the courts or other official forums.

Conciliation is an informal process in which the third party tries to bring the disputants to agreement by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement, either informally or, in a subsequent step, through formal mediation.

Mediation is a process in which the mediator assists the disputants to reach a negotiated settlement of their differences. Mediation is usually a voluntary process that results in a signed agreement that defines the future behavior of the parties. The mediator is not empowered to render a decision.

The mini-trial is often used after companies in a dispute have begun litigation, but before the case has come to trial in court. A typical mini-trial might entail a period of limited discovery after which attorneys present their best cases to managers with authority to settle and, most often, a neutral adviser who may be a retired judge (*see below*) or other lawyer.

Private judging is a procedure in which a judge, on stipulation of the parties, can refer a pending lawsuit to a private neutral party for trial with the same effect as though the case were tried in a courtroom. The verdict can be appealed through the regular court appellate system. Parties may also engage in private judging without a referral from a court of law and may agree beforehand whether the judge's verdict will be binding.

Regulatory negotiation (reg/neg) or public policy dialogue is aimed at bringing together representatives of business, public interest groups and government, with the help of a neutral, to explore regulatory matters. The dialogue is intended to identify areas of agreement, to narrow areas of disagreement and to identify general areas and specific topics for negotiation.

Source: *Paths to Justice: Major Public Policy Issues of Dispute Resolution,* Report of the *Ad Hoc* Panel on Dispute Resolution and Public Policy; prepared by the National Institute for Dispute Resolution, October 1983.

problems in that arena as well." Zoll emphasizes that "our interest in encouraging ADR is to further a trend that is already under way."

Sometimes, try as a company might, ADR does not work out. In other situations, ADR may not be applicable. "We have suggested ADR in a couple of disputes," says Rohm and Haas's Subak. "So far, we have not been able to convince the other side to use it." In one instance, the other side "felt we were simply too far apart in our positions to make it worthwhile." However, Subak says, "we think we will use it and use it successfully" in the future.

Guidelines. For those instances in which companies think that ADR may be a viable alternative, a number of techniques and ADR centers are available (*table, p. 29*). Some centers publish reference materials to help companies conduct their own ADR proceedings. For example, CPR has set up guidelines on ADR procedures for multiparty Superfund site cost allocation, and loss allocation in toxic tort cases. It also has drafted a model mini-trial agreement for business disputes . The Keystone Center in Colorado has developed a "Siting Process Handbook," outlining an ADR approach for siting hazardous waste management facilities.

Of the techniques applicable to business disputes, one of the most promising is the mini-trial—an out-of-court procedure, used with or without an impartial third party to guide the parties (*box, above*). Henry says that mini-trials have been successful "in reducing legal costs and expediting the procedure, and [in] giving a better result than in court. Business executives, having a knowledge of business procedures, come up with a win/win result, which the court would love to do but can't because of the adversary structure of its proceedings, which give a win/lose result."

'A lot of lawyers . . . are afraid the other side won't lay its facts on the table'

Attorneys who have been involved in mini-trials say the technique is most often used after litigation has commenced, but well before the matter comes to trial in court. "Mini-trials occur generally after six months to one year of trial preparation [and] discovery"—that phase of litigation during which both sides collect information from each other, says Kearney. "Then," he explains, "each side knows the law . . . the risks [of engaging in ADR or pushing on with the legal case] become more clear," the issues better defined.

Preparing to offer the option of a mini-trial to the other side of a dispute is not a matter only for the lawyers, Gould stresses. The executives involved in the conflict must become active participants. So must officers or managers within the corporation who are not directly involved in the dispute. Once those individuals are chosen, says Gould, "we then talk to the other side," asking them if they would be interested in having "a situation where we would come in—the lawyers from XYZ Corp.—and we would present our side of the case to officers from our company and from your company, with a view that when this process is over, you will have heard our side, we'll have heard your side, and people who are not involved in the fight or dispute on each side will then go off and meet with each other and try to resolve it."

'Rent-a-judge.' The mini-trial might take a number of forms, even going as far as holding a full "mock trial," complete with "jurors" who are members of the companies in dispute with each other. Sometimes, Gould notes, "the two sides hire a retired judge to sit in the middle and run [the mini-trial] procedurally," as he or she would in a real courtroom. This is sometimes referred to as "private judging," or "rent-a-judge."

Again, as in other ADR techniques, reminds CIIT's Wessel, "private judging is a term that has a lot of variation." But in essence, he says, private judging is a "form of arbitration," in that the mini-trial private judge "will in fact render a decision for you." However, Wessel says, "sometimes, the private judge acts really as a sort of adviser, mediator, conciliator," who will say "'here's what will happen to you if. . . .'"

Allowing a private judge in a mini-trial to act as an arbitrator, rather than a mediator, can present problems, warns Gould. The judge's opinion, whether binding or not, he says, could influence the outcome of the negotiations. "Practically speaking," Gould adds, "when the two sides go off to make a decision on how to settle, if a former judge says to them, 'I think ABC Corp. has a better argument than XYZ Corp.,' that has an impact on the way that case gets resolved."

Mini-trials, while a relatively recent development in the ADR arsenal, are not the newest dispute resolution method on the block. "What is new," says NIDR's Drake, particularly "in the chemical industry," is the application of mediation and other forms of negotiation to public policy and environmental and regulatory disputes. The ADR buzzword of choice for this phenomenon is "reg/neg," which stands for regulatory negotiation or negotiated rule making.

Reg/neg. The "heart" of the reg/neg approach, explains Ehrmann, is the bringing together, usually by a government entity like the Environmental Protection Agency (EPA), of all groups that might be interested in, or adverse to, a regulation or set of rules that the agency has to promulgate. In lieu of implementing the regulation and then allowing everyone opposed to it to take the agency to court, says Ehrmann, the agency will bring all sides together to discuss the matter beforehand.

Such discussions, Drake says, are "important to the industry, public agencies and the environmental groups" that become involved. By bringing in interested parties prior to promulgation, he explains, "you work out consensus on regulations." He adds that, particularly with "the sensitive and controversial rule makings, the federal agencies involved are frequently sued after the rule is promulgated." After going to court over a regulation, he notes, it's much more difficult to come back to the negotiation table.

CMA's Zoll: 'Our interest in encouraging ADR is to further a trend already under way'

The agency with the most experience in this area is EPA, which has established a separate reg/neg program, although the Occupational Health and Safety Administration and other agencies have dabbled in reg/neg, too. "I'm very excited about what we've been able to do," says Chris Kirtz, director of EPA's regulatory negotiation project.

Under Kirtz's guidance, and with the help of outside, professional negotiator/facilitators, EPA has successfully negotiated two regulations. One of these is a rewrite of the emergency pesticide exemptions under Section 18 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Those negotiations involved both CMA and the National Agricultural Chemicals Assn. (NACA), as well as the U. S. Dept. of Agriculture, environmental organizations and pesticide users. This group had four months in which to negotiate all the provisions of the Section 18 regulations.

Almost a record. "NACA was selected as a principal" in the negotiations, recalls Earl C. Spurrier, NACA's vice-president of regulatory affairs, who headed a subcommittee within the discussions. It was, he says, "the first time that [all these groups] sat around the table in a harmonious relationship. We were able to disagree without being disagreeable." And at the end of the four months, the group had drafted a preamble and the regulations, "which," he insists, "is almost record breaking."

The draft regulations already have been published in the *Federal Register*, and a 60-day comment period on the draft ended recently. Now, Spurrier says, EPA is going over "our comments on the comments. EPA will put it into the final rule-making language," which will then go into the *Federal Register* "as a final rule in January 1986." Usually, Spurrier notes, "it takes the better part of two to three years" from the time a regulation is proposed until it gets to this final stage. Using reg/neg, the whole process will have taken 17-18 months from start to finish.

"We've saved at least six months to a year," Spurrier boasts, partly by getting out of the way, up front, the comments that, under normal procedures, would be submitted after the fact. In that way, "we took away about 90% of the trash that EPA would have had to wallow through," he points out. Besides, he says, "I enjoyed the procedure. I'd do it again, and I'd recommend [reg/neg] for anybody with a controversial" government issue to work through.

EPA is hoping that such enthusiasm for its reg/neg process will have a "spillover effect," says Milton Russell, assistant administrator for policy, planning and evaluation. Kirtz's program is already feeling this within EPA itself. With two successful reg/neg procedures "in the bag," he says, "we have our own resources demanding" that Kirtz help them with their own reg/negs. "The first year," he reminisces, drumming up support "was like [the labors of] Sisyphus." Now, he predicts, "in the next five to six months, we'll get three more [reg/negs] under way."

No panacea. Kirtz and Russell expect that EPA will institutionalize this ADR process and turn it into a standard option for promulgating regulations. Kirtz points out that there are 200-250 regulations under development within the agency at any one time. However, he is careful to say, "I don't want people out there to think that we think this is a panacea. We have no illusions that this is appropriate for all or even most of our rules." Rather, says Russell, ADR will be used in the "small percentage" of rule makings that lend themselves to that process. But, Kirtz says, every successful reg/neg saves the agency money and time. "Our experience suggests," he sums up, "that looking ahead, these gains will be significant."

"In my view," says Conservation Foundation's Bingham, "the objective of" reg/neg, mini-trials, mediation and all other ADR techniques "is consensus building." ADR as a method of problem solving and as a movement "has really progressed over the past 10 years. ... What's coming," she predicts, is the incorporation of "that understanding into public decision-making institutions," such as EPA's reg/neg project. "I think that's the most exciting thing that's going to happen in the next 10 years."

The objective of mini-trials and all other ADR techniques 'is consensus building'

That evolution will take place in several areas at the same time. ADR's champions believe that within a few years, concepts about how to negotiate complex disputes over such issues as Superfund apportionment, hazardous-waste-facility siting and toxic tort cases—and the techniques to do so—will become more sophisticated. Negotiators and mediators will also become more proficient as the "profession of mediation grows and matures," predicts Bingham, noting that the membership of the Society of Professionals in Dispute Resolution "grew 100% in the last year and a half."

While mediators and techniques become more sophisticated, the next generation of lawyers and business professionals will be learning about ADR from professors rather than from experience after years in the field. What that will produce, Bingham hopes, is a "whole generation predisposed to dispute resolution as a method of first resort."

"When we can get to the point where [ADR methods] are just another set of tools in a field with a spectrum of possibilities," says Ehrmann, "we'll really have gotten where we want to be." But to get there, says Drake, ADR must become more widely accepted. "The most direct way" for that to happen, says Ehrmann, is for executives, lawyers and government officials to experience successful ADR for themselves. "But," concludes Ehrmann, "word of mouth is the best marketing tool." ☐

LAURIE A. RICH, with
Kenneth Jacobson in New York City

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COMMENTARY

ALTERNATIVE DISPUTE RESOLUTION: PANACEA OR ANATHEMA?

*Harry T. Edwards**

The Alternative Dispute Resolution (ADR) movement has seen an extraordinary transformation in the last ten years. Little more than a decade ago, only a handful of scholars and attorneys perceived the need for alternatives to litigation. The ADR idea was seen as nothing more than a hobbyhorse for a few offbeat scholars. Today, with the rise of public complaints about the inefficiencies and injustices of our traditional court systems, the ADR movement has attracted a bandwagon following of adherents. ADR is no longer shackled with the reputation of a cult movement.

At worst, ADR is merely a highly fashionable idea, now viewed as worthy of serious discussions among practitioners and scholars of widely diverse backgrounds and professional interests. At best, the ADR movement reflects a serious new effort to design workable and fair alternatives to our traditional judicial systems. There can be no doubt, however, that the ADR movement has drawn wide public attention. During the past five years, there have been literally scores of books, articles, conferences, bulletins, newsletters, and new course offerings on ADR. Mechanisms for alternative dispute resolution are now being established throughout the United States, with well over one hundred and fifty minor dispute mediation centers in almost forty states,[1] and court-annexed arbitration is now actively used in both state and federal courts.[2] These are indeed heady times for those in the ADR movement. There is reason for concern, however, that the bandwagon may be on a runaway course.

Popularity and public interest are not sure signs of a quality endeavor. This is certainly true of ADR, because the movement is ill-defined and the motives of some ADR adherents are questionable. It appears that some people have joined the ADR bandwagon, without regard for its purposes or consequences, because they see it as a fast (and sometimes interesting) way to make a buck. It has also been suggested that some of those people who promote ADR as a means to serve the poor and oppressed in society are in fact principally motivated by a desire to limit the work of the courts in areas affecting minority interests, civil rights, and civil liberties. And it is sometimes claimed that there are those who subscribe to the ADR movement because they view efficient and inexpensive dispute resolution as an important societal goal, without regard for the substantive results reached. If the ADR movement prominently reflects such thinking then it is unclear whether the movement is a panacea for, or is anathema to, the perceived problems in our traditional court systems.

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[1] Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134, 136 (1984).

[2] Sixteen states and ten federal district courts have authorized court-ordered arbitration programs. *See Background and Status*, DISPUTE RESOLUTION F., Aug. 1985, at 4.

My principal concern is that, in our enthusiasm over the ADR idea, we may fail to think hard about what we are trying to accomplish. It is time that we reflect on our goals and come to terms with both the promise and the danger of alternatives to traditional litigation.[3] In this essay I will offer some views on the direction this reflection should take.

I. The Problem in Perspective

If alternative dispute resolution mechanisms are most significant as substitutes for traditional litigation, then it is important to assess the specific problems facing our judicial system that ADR seeks to address.[4] Fortunately, the literature on this subject is so extensive that it is unnecessary here to rehash the issues or to resolve the ongoing debate as to whether we are truly an overly litigious society.[5] It is enough to note that, in recent years, the cost of litigation has substantially increased and the number of cases filed in state and federal courts has mushroomed. For example, between 1960 and 1980 the number of filings per capita in federal district courts nearly doubled.[6] Although our judicial systems recently have been adjusted to meet this massive increase in caseload,[7] it is somewhat pollyanish to view the addition of still more judges as an acceptable solution to our society's ever increasing demand for judicial resources.

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[3] By "alternative" dispute resolution I mean to focus on any ADR system that resolves disputes pursuant to methods other than *traditional* litigation or government regulatory action. Some alternatives — such as court-annexed arbitration — act as adjuncts to courts. Others, however, use private fora not connected in any way to government institutions.

[4] This Commentary will focus on the caseload problems of our judicial systems. However, I recognize that ADR is also responding to other problems with the legal system. *See* Abel, *The Contradictions in Informal Justice*, in THE POLITICS OF INFORMAL JUSTICE 310 (R. Abel ed. 1982); Edwards, *Hopes and Fears for Alternative Dispute Resolution*, 21 WILLAMETTE L. REV. 425 (1985).

[5] *See, e.g.*, Edwards, *The Rising Workload and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871 (1983); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1981); Trubeck, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983).

[6] *See* Galanter, *supra* note 5, at 37.

Of course, it is misleading to look at statistics on court congestion as conclusive evidence of the faults of judicial process because, in state and federal courts, about ninety percent of all cases are settled without adjudication.[8] Although (or maybe because) case filings are high, we already have an "alternative dispute resolution" system that emphasizes negotiation rather than adjudication. Unfortunately, our experiences with litigation-settlement negotiations have been far short of satisfactory. Recent research reveals widespread dissatisfaction among trial attorneys, with a "staggering" eighty-five percent agreeing that the ad hoc processes now employed in connection with litigation-settlement negotiations could be significantly improved. The parties involved complain that compromise comes too late, is too expensive, and is too stressful.[9]

While there is obvious room for improvement in the way we settle cases — perhaps by encouraging a more active judicial role in settlement negotiations — it is probably naive to think that this alone will fully solve the problems with our burgeoning caseloads. Many judges simply lack the mediation skills necessary for the successful resolution of cases through compromise. There is, unfortunately, no obvious match between the characteristics that make for excellent judging and the skills required for successful mediation. Additionally, we cannot depend on private litigants to settle cases satisfactorily on their own; too many lawyers view the suggestion of compromise as an admission of weakness and therefore delay the initiation of negotiations with the hope that the onus of suggesting settlement will fall on opposing counsel.[10] Also, lawyers often become so convinced of the merits of their clients' positions that they may have wholly unrealistic expectations regarding the outcome of a case, thereby lessening the possibilities of successful early negotiation. For these reasons, we should be highly skeptical of existing trial settlement processes as we search for viable mechanisms for alternative dispute resolution. Parties will continue to settle cases, but it is unlikely that the settlement process will improve if we rely solely on the ad hoc negotiation processes currently in use.

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[7] *See id.*

[8] A study of cases in five federal district courts and at least one state court in each federal district found that less than 8% of the cases went to trial. In 22.5% of the cases, the judge either dismissed the case or rendered judgment on the merits summarily. The remainder were resolved by settlement. *See* Trubeck, Sarat, Felstiner, Kritzer & Grossman, *supra* note 5, at 89.

[9] *See* W. BRAZIL, SETTLING CIVIL SUITS 1 (1985). According to Brazil, "the process through which the parties eventually reach agreement often is difficult to launch, then can be awkward, expensive, time-consuming, and stressful. The route to resolution can be tortuously indirect and travel over it can be obstructed by emotion, posturing, and interpersonal friction." *Id.* at 44.

[10] *See id.* at 45.

Given the inadequacy of traditional responses to the manifold problems with our court systems, it is not surprising that many commentators believe that we must develop new approaches for dispute resolution in lieu of litigation. Generally, I concur, but I think that there are two critical threshold inquiries that we must make before we leap to embrace any system of ADR. First, we should consider whether an ADR mechanism is being proposed to facilitate existing court procedures, or as an alternative wholly separate from the established system. Second, we must consider whether the disputes that will be resolved pursuant to an ADR system will involve significant public rights and duties. In other words, we must determine whether ADR will result in an abandonment of our constitutional system in which the "rule of law" is created and principally enforced by legitimate branches of government and whether rights and duties will be delimited by those the law seeks to regulate. Perhaps the best way to conceptualize these critical issues is by reference to a simple matrix:

	Private Disputes	Public Disputes
ADR in Court	Private Disputes Resolved by Adjuncts to Courts	Public Law Issues Resolved by Adjuncts to Courts
ADR Outside Court	Private Disputes Resolved by Independent Mechanisms	Public Law Issues Resolved by Independent Mechanisms

Obviously, many disputes cannot be easily classified as solely *private* disputes that implicate no constitutional or public law. Many commentators have tried to distinguish "public" and "private" disputes; but, in my view, no one has been fully successful in this effort. The problem is that hidden in many seemingly private disputes are often difficult issues of public law. In this Commentary, I offer no easy solution to the definitional problem of public/private disputes. I do suggest, however, that there are a number of public law cases that are easily identifiable as such. These include constitutional issues, issues surrounding existing government regulation, and issues of great public concern. The latter category might include, for example, the development of a legal standard of strict liability in products liability cases.[11] Although less easily identifiable than constitutional and regulatory issues, such issues of great public concern can be accommodated so long as ADR mechanisms are created as adjuncts to existing judicial or regulatory systems, or if these issues can be relitigated in court after initial resolution pursuant to ADR.[12]

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[11] *See, e.g.*, Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).

My purpose in creating a public/private law matrix is not to give court administrators a fool-proof method of assigning cases to appropriate dispute resolution systems.[13] Instead, the matrix helps to illuminate those aspects of ADR that should give rise to the greatest concern. In particular, we must focus on the quadrant of the matrix that would allow for the resolution of public law disputes in ADR systems that are totally divorced from courts. ADR mechanisms falling within this quadrant, I believe, are wholly inappropriate.

In the remainder of this Commentary I will explore the hazards and possibilities presented by each quadrant in the matrix, beginning with two quadrants that involve the use of ADR as an adjunct to our traditional court system.

II. THE ROLE OF ADR WITHIN THE TRADITIONAL COURT SYSTEM

One way to deal with the caseload problem is simply to divert cases from litigation by limiting the jurisdiction of the courts. There are two difficulties with such a "demand-side" approach. First, limiting the jurisdiction of courts may result in diminished rights for minorities and other groups, whose cases in areas like civil rights, prisoner suits, and equal employment are likely to be the first removed from the courts. Second, the jurisdiction-limiting solution fails to recognize the potential role of ADR *within* the traditional court systems. If we rush to limit the substantive jurisdiction of our courts, we may lose our best opportunity to experiment with the promise of ADR.

Implicitly recognizing these two difficulties, many ADR advocates have suggested the use of ADR as an adjunct to federal and state court systems. ADR would not replace litigation, but instead would be used to make our traditional court systems work more efficiently and effectively. Because the vast majority of all court cases are settled rather than adjudicated, many commentators believe that ADR has an enormous potential for reducing caseloads by enhancing the effectiveness of settlement; at the same time, because ADR would be under the careful supervision of courts, there is far less danger that ADR would become a nefarious scheme for diminishing the rights of the underprivileged in our society.

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[12] *Cf.* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (holding that title VII claims should be heard de novo in federal court even after the claims are heard in grievance arbitration).

[13] The recent Supreme Court decision in Thomas v. Union Carbide Agric. Prods. Co., 105 S. Ct. 3325 (1985), is not inconsistent with my central thesis that public law should not be resolved by private ADR mechanisms. *Thomas* held that article III does not prohibit Congress from selecting binding arbitration as the mechanism for resolving compensation disputes among participants in the Federal Insecticide, Fungicide, and Rodenticide Act's pesticide registration scheme. In *Thomas*, arbitration was chosen by *Congress* pursuant to standards that it set. There was no danger that private parties would decide issues of public law.

Thomas is also noteworthy because it employed a public/private distinction. It was, however, using the distinction as developed in article III jurisprudence. This Commentary employs the public/private distinction for an entirely different purpose. While article III is concerned about the exercise of judicial power by the political branches of government, my concern is that public law issues may be resolved by *nongovernmental* bodies. Nevertheless, the complexity of the public/private distinction, as exemplified by *Thomas*, reinforces my belief that decisions to use ADR should be made on a case-by-case basis.

There are several ways in which the enormous settlement-enhancing potential of ADR can be tapped. Many lawyers insist that a neutral, penetrating, and analytical assessment of a case greatly enhances the prospects of a successful negotiation by offering a realistic view of what could transpire if a case goes to full-blown adjudication.[14] Furthermore, because too many lawyers view the suggestion of compromise as an admission of weakness, mechanisms that place the onus of suggesting settlement negotiations on neither party have tremendous potential for initiating settlement at much earlier stages in the litigation.[15]

Indeed, many private litigants and courts already use ADR because it offers such a neutral assessment and requires parties to think about compromise at earlier stages in the litigation. For example, several corporations have pioneered the resolution of large and complicated business disputes by mini-trials.[16] Although the result is nonbinding, mini-trials have been tremendously successful in settling cases quickly. Business litigants frequently find the opinion of a third party invaluable in deciding how best to settle many quite complicated cases. The mini-trials also have the virtue of forcing corporate litigants to confront the weaknesses in their cases.[17] Unfortunately, however, mini-trials are a realistic option only for the wealthy, and the success of mini-trials may result from the fact that they are initiated by the *parties*, who thereby show their predisposition to settle.

Court-annexed arbitration — quickly being adopted in many state and federal courts — may offer a "poor man's mini-trial." Many jurisdictions have compulsory arbitration for particular classes of cases — primarily tort and contract disputes with potential damage awards below an established dollar ceiling. Critically, therefore, court-annexed arbitration is most often used to resolve private disputes rather than difficult public law issues.[18] Indeed, by diverting private disputes to arbitration, federal and state courts may be able to expend more time and energy resolving difficult public law problems.

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[14] *See* W. Brazil, *supra* note 9, at 44–46.

[15] *See id.* at 45.

[16] The first use of the mini-trial was a patent infringement action brought by Telecredit against TRW. After three years of litigation, the two parties held a nonbinding arbitration before executives of both corporations and former Judge James Davis of the Court of Claims. Thirty minutes after the hearing, the parties settled. *See* Green, *Recent Developments in Alternative Forms of Dispute Resolutions*, 100 F.R.D. 512, 514–16 (1983). Judge Lambros has introduced a "summary jury trial" modeled after the mini-trial. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984).

[17] The mini-trial has been successful in settling disputes of several major corporations including Control Data Corp., Burroughs Corp., Gillette Corp., and Texaco. *See* Green, *supra* note 16, at 517.

The experience in most *state* court-annexed arbitration programs is very encouraging. A large percentage of the disputants accept the arbitrated settlements and express satisfaction with the arbitration process. In Pittsburgh, for example, court-annexed arbitration ends three-quarters of all cases without appeal, and the median time to a hearing is three months, in marked contrast to an eighteen-month wait for trial.[19] In Michigan, although disputants accept the arbitration award in less than half of the cases, only seven percent of all cases in which the arbitration award is rejected actually go to trial.[20]

Of course, in the excitement over the docket-clearing potential of court-annexed arbitration, we must not make the mistake of ignoring the *quality* of arbitration outcomes. The evidence on this is sparse, but a study of the Pittsburgh program did find that most participants viewed arbitration outcomes as fair.[21] Additionally, court-annexed arbitration has many of the characteristics of adjudication — most notably the application of rules of law by neutral decisionmakers.

Unfortunately, the success of arbitration programs has been less than uniform. The seventh amendment right to a jury trial requires that arbitrated settlements be nonbinding, unless the parties agree otherwise.[22] In cases seen to be very important to the litigants — whether for monetary reasons or otherwise — losing parties are rarely willing to accept the result of arbitration as long as a trial de novo remains available and they have so little to lose by resorting to full-blown litigation. Only if parties agree *beforehand* to waive their jury rights can arbitration be fully effective.[23]

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[18] Obviously, some small tort and contract disputes can often present novel and important public law issues. The danger of this occurring, however, is much less than that which would occur if constitutional and regulatory cases were arbitrated. Furthermore, court-annexed arbitration ensures the parties eventual access to the courts, where novel public law issues can be resolved.

[19] *See* INSTITUTE FOR CIVIL JUSTICE, AN OVERVIEW OF THE FIRST FIVE PROGRAM YEARS 36 (1983).

[20] *See* Shuart, Smith & Planet, *Settling Cases in Detroit: An Examination of Wayne County's "Mediation" Program*, 8 JUST. SYS. J. 307, 315 (1983).

[21] INSTITUTE FOR CIVIL JUSTICE, *supra* note 19, at 36.

[22] The nonbinding nature of court-annexed arbitration has been the key factor permitting federal court-annexed arbitration to survive seventh amendment challenge. *See* New Eng. Merchants Nat'l Bank v. Hughes, 556 F. Supp. 712, 714 (E.D. Pa. 1983); Kimbrough v. Holiday Inn, 478 F. Supp. 566 (E.D. Pa. 1979).

[23] Over half of all arbitrated settlements in the Maryland Health Claims Arbitration System,

Even with this problem of finality, court-annexed arbitration has increased the ease with which cases are settled. Most parties that reject arbitration decisions eventually settle — often earlier than they would have in the absence of arbitration. Even if parties do not accept the outcome of arbitration, the arbitrator's decision forces both parties to focus on a neutral third-party's realistic assessment of the case.[24]

As our experience with court-annexed arbitration demonstrates, federal and state courts are striving mightily to accommodate and encourage the development of demonstrably effective dispute resolution mechanisms, especially in cases involving private disputes. At the same time, because these alternatives allow for careful supervision by the judiciary, there is less danger that the poor will find no room on the docket. And, most importantly, under these ADR mechanisms, which function as adjuncts to existing court systems, there is little likelihood that we will see the creation or development of public law by private parties. By focusing on that quadrant of the matrix offering the least concern — the resolution of mostly private disputes by ADR systems that act as adjuncts to courts — programs such as court-annexed arbitration may diminish the pressure on courts to reduce substantive rights in response to perceived or actual excessive caseloads.

III. THE ROLE OF ADR AS AN "ALTERNATIVE" SYSTEM

It is clear, however, that a number of ADR proponents have a far more ambitious vision of ADR than that set forth so far. Some, such as Jerold Auerbach, seem to favor community resolution of disputes

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for example, are refused by parties who demand a trial de novo. *See* MacAlister & Scanlan, *Health Claims Arbitration in Maryland: The Experiment Has Failed*, 14 U. BALT. L. REV. 481, 501 (1985). Similarly, about 60% of the litigants studied in three federal district courts refused arbitrated settlements in the court-annexed arbitration programs adopted by those courts. *See* E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 76 (1983).

[24] A study of three federal district court programs found that, in two of the three districts studied, the time from filing to disposition decreased as a result of arbitration. In most cases this was because arbitration encouraged earlier settlements. *See* E. LIND & J. SHAPARD, *supra* note 23, at 76–77.

In addition, some private groups have begun using agreements designed to prevent litigation altogether. IBM and Hitachi, for example, have agreed, as part of a consent decree in a major trade secret case, to resolve all future trade secrets disputes by negotiation and arbitration. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 545 (1985). Although not court-annexed, this type of agreement between two private parties is not troubling because it is unlikely to implicate public law issues.

using community values instead of the rule of law.[25] Others, such as the Chief Justice, complain that "there is some form of mass neurosis that leads many people to think courts were created to solve all the problems of mankind," and believe that ADR must be used to curb the "flood" of "new kinds of conflicts" (such as "welfare . . . claims under the Equal Protection Clause") that have purportedly overwhelmed the judicial system.[26] In either case, these ADR advocates propose a truly revolutionary step — the resolution of cases through ADR mechanisms free from any judicial monitoring or control.

If we can assume that it is possible to finance and administer truly efficient *systems* of dispute resolution, then there would appear to be no significant objections to the use of even wholly independent ADR mechanisms to resolve private disputes that do not implicate important public values. For instance, settling minor grievances between neighbors according to local mores or resolving simple contract disputes by commercial norms may lead to the disposition of more disputes and the greater satisfaction of the participants. In strictly private disputes, ADR mechanisms such as arbitration often are superior to adjudication. Disputes can be resolved by neutrals with substantive expertise, preferably chosen by the parties, and the substance of disputes can be examined without issue-obscuring procedural rules.[27] Tens of thousands of cases are resolved this way each year by labor and commercial arbitration,[28] and even more private disputes undoubtedly could be better resolved through ADR than by adjudication.

However, if ADR is extended to resolve difficult issues of constitutional or public law — making use of nonlegal values to resolve important social issues or allowing those the law seeks to regulate to delimit public rights and duties — there is real reason for concern. An oft-forgotten virtue of adjudication is that it ensures the proper resolution and application of public values. In our rush to embrace alternatives to litigation, we must be careful not to endanger what law has accomplished or to destroy this important function of formal adjudication. As Professor Fiss notes:

> Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and

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[25] *See* J. AUERBACH, JUSTICE WITHOUT LAW? 138–47 (1983). However, even Auerbach recognizes serious limitations on the use of local values in modern society, *see, e.g.*, *id.* at 144 ("[A]lternatives prevent the use of courts for redistributive purposes in the interest of equality, by consigning the rights of disadvantaged citizens to institutions with minimal power to enforce or protect them.").

[26] Address by Chief Justice Warren E. Burger, in Minneapolis, Minnesota 4 (Aug. 21, 1985).

[27] *See* S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 24, at 189.

[28] *See* Meyerowitz, *The Arbitration Alternative*, A.B.A. J., Feb. 1985, at 78–79.

> conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, not simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality in accord with them.[29]

The concern here is that ADR will replace the rule of law with nonlegal values. J. Anthony Lucas' masterful study of Boston during the busing crisis highlights the critical point that often our nation's most basic values — such as equal justice under the law — conflict with local nonlegal mores.[30] This was true in Boston during the school desegregation battle, and it was true in the South during the civil rights battles of the sixties. This conflict, however, between national public values reflected in rules of law and nonlegal values that might be embraced in alternative dispute resolution, exists in even more mundane public issues.

For example, many environmental disputes are now settled by negotiation and mediation instead of adjudication. Indeed, as my colleague Judge Wald recently observed, there is little hope that Superfund legislation can solve our nation's toxic waste problem unless the vast bulk of toxic waste disputes are resolved through negotiation, rather than litigation.[31] Yet, as necessary as environmental negotiation may be, it is still troubling. When Congress or a government agency has enacted strict environmental protection standards, negotiations that compromise these strict standards with weaker standards result in the application of values that are simply inconsistent with the rule of law. Furthermore, environmental mediation and negotiation present the danger that environmental standards will be set by private groups without the democratic checks of governmental institutions. Professor Schoenbrod recently has written of an impressive environmental mediation involving the settlement of disputes concerning the Hudson River. According to Schoenbrod, in that case private parties bypassed federal and state agencies, reached an accommodation on environmental issues, and then presented the settlement to governmental regulators. The alternative to approval of the settlement was continued litigation, which was already in its seventeenth year, with no end in sight.[32]

The resulting agreement may have been laudable in bringing an end to protracted litigation. But surely the mere resolution of a dispute is not proof that the public interest has been served. This is not to say that private settlements can never produce results that are consistent with the public interest; rather, it is to say that private settlements are troubling when we have no assurance that the legislative- or agency-mandated standards have been followed, and when we have no satisfactory explanation as to why there may have been a variance from the rule of law.

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[29] Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

[30] *See* J. LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES 127 (1985); Lukas, *Community and Equality in Conflict*, N.Y. Times, Sept. 8, 1985, at E5, col. 2.

[31] *See* Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1, 8 (1985).

[32] *See* Schoenbrod, *Limits and Dangers of Environmental Mediation: A Review Essay*, 58 N.Y.U. L. REV. 1453, 1466–67 (1983).

In the Hudson River example, we should be concerned if private negotiators settled the environmental dispute without any meaningful input or participation from government regulators, or if the private parties negotiated a settlement at variance with the environmental standard that had been established by government agencies. If, however, government agencies promulgated the governing environmental standards pursuant to legislatively established rulemaking procedures (which, of course, involve public participation), and if the private parties negotiated a settlement in accordance with these agency standards and subject to agency approval, then the ADR process may be seen to have worked well in conjunction with the rule of law. Indeed, the environmental negotiators may have facilitated the implementation of the rule of law by doing what agency regulators had been unable to achieve for seventeen years.

A subtle variation on this problem of private application of public standards is the acceptance by many ADR advocates of the "broken-telephone" theory of dispute resolution that suggests that disputes are simply "failures to communicate" and will therefore yield to "repair service by the expert 'facilitator.'"[33] This broken-telephone theory was implicitly illustrated in a speech by Rosalynn Carter describing the admittedly important work of the Carter Center at Emory University in Atlanta. The Carter Center recently conducted a seminar that brought together people on both sides of the tobacco controversy. According to Rosalynn Carter, "when those people got together, I won't say they hated each other, but they were enemies. But in the end, they were bringing up ideas about how they could work together."[34]

This result is praiseworthy — mutual understanding and good feeling among disputants obviously facilitates intelligent dispute resolution — but there are some disputes that cannot be resolved simply by mutual agreement and good faith. It is a fact of political life that many disputes reflect sharply contrasting views about fundamental public values that can never be eliminated by techniques that encourage disputants to "understand" each other. Indeed, many disputants understand their opponents all too well. Those who view tobacco as an unacceptable health risk, for example, can never fully reconcile their differences with the tobacco industry, and we should not assume otherwise. One essential function of law is to reflect the public resolution of such irreconcilable differences; lawmakers are forced to choose among these differing visions of the public good. A potential danger of ADR is that disputants who seek only understanding and reconciliation may treat as irrelevant the choices made by our lawmakers and may, as a result, ignore public values reflected in rules of law.

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[33] C. KRAUTHAMMER, CUTTING EDGES: MAKING SENSE OF THE EIGHTIES 4–5 (1985).

[34] May, *Ex-First Lady Tells of Work of Carter Center*, Detroit Free Press, Sept. 13, 1985, at 8B.

We must also be concerned lest ADR becomes a tool for diminishing the judicial development of legal rights for the disadvantaged. Professor Tony Amsterdam has aptly observed that ADR may result in the reduction of possibilities for legal redress of wrongs suffered by the poor and underprivileged, "in the name of increased access to justice and judicial efficiency."[35] Inexpensive, expeditious, and informal adjudication is not always synonymous with *fair* and *just* adjudication. The decisionmakers may not understand the values at stake and parties to disputes do not always possess equal power and resources. Sometimes because of this inequality and sometimes because of deficiencies in informal processes lacking procedural protections, the use of alternative mechanisms will produce nothing more than inexpensive and ill-informed decisions. And these decisions may merely legitimate decisions made by the existing power structure within society. Additionally, by diverting particular types of cases away from adjudication, we may stifle the development of law in certain disfavored areas of law. Imagine, for example, the impoverished nature of civil rights law that would have resulted had all race discrimination cases in the sixties and seventies been mediated rather than adjudicated. The wholesale diversion of cases involving the legal rights of the poor may result in the definition of these rights by the powerful in our society rather than by the application of fundamental societal values reflected in the rule of law.

Family law offers one example of this concern that ADR will lead to "second-class justice." In the last ten years, women have belatedly gained many new rights, including new laws to protect battered women and new mechanisms to ensure the enforcement of child-support awards. There is a real danger, however, that these new rights will become simply a mirage if all "family law" disputes are blindly pushed into mediation. The issues presented extend beyond questions of unequal bargaining power. For example, battered women often need the batterer ordered out of the home or arrested — goals fundamentally inconsistent with mediation.[36]

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[35] Address by Professor Anthony G. Amsterdam, Judicial Conference, D.C. Circuit (May 21, 1984), *reprinted in* 105 F.R.D. 251, 291 (1985).

[36] As Carol Lefcourt of the National Center on Women and Family Law explains:

Some forms of mediation, however, would protect the public values at stake. Professors Mnookin and Kornhauser suggest, for example, that divorce settlements can be be mediated successfully despite disparities in bargaining power by requiring court review of settlements that deviate from a predefined norm.[37] Additionally, some disputes that are not otherwise subject to court review also might be well suited for mediation.[38] Many cases, however, may require nothing less than judicial resolution. At the very least we must carefully evaluate the appropriateness of ADR in the resolution of particular disputes.

Even with these concerns, however, there are a number of promising areas in which we might employ ADR in lieu of traditional litigation. Once a body of law is well developed, arbitration and other ADR mechanisms can be structured in such a way that public rights and duties would not be defined and delimited by private groups. The recent experience of labor arbitrators in the federal sector, who are required to police compliance with laws, rules, and regulations, suggests that the interpretation and application of law may not lie outside the competence of arbitrators.[39] So long as we restrict arbitrators to the application of clearly defined rules of law, and strictly confine the articulation of public law to our courts, ADR can be an effective means of reducing mushrooming caseloads. Employment discrimination cases offer a promising example. Many employment discrimination cases are highly fact-bound and can be resolved by applying established principles of law. Others, however, present novel questions that should be resolved by a court. If the more routine cases could be certified to an effective alternative dispute resolution system that would have the authority to make some final determinations, the courts could devote greater attention to novel legal questions, and the overall efficiency of an anti-discrimination law might be enhanced.[40]

> The goals of mediation — communication, reasonable discourse, and joint resolution of adverse interests — work against the most immediate relief the battered woman requires. The goals she seeks are protection from violence, compensation, possession of her home without the batterer, and security for her children. Only the judicial system has the power to remove the batterer from the home, to arrest when necessary, and to enforce the terms of any decree if a new assault occurs. The empirical data now show that the therapeutic model for handling battering is ineffective and that firm law enforcement including imprisonment is required to deter wife abuse.

Lefcourt, *Women, Mediation and Family Law*, 18 CLEARINGHOUSE REV. 266, 268 (1984).

[37] *See* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 993 (1979).

[38] *See* R. Abel, *The Contradictions in Informal Justice*, in THE POLITICS OF INFORMAL JUSTICE 309 (R. Abel ed. 1982).

[39] *See, e.g.*, Devine v. White, 697 F.2d 421, 438–39 (D.C. Cir. 1983) (suggesting that labor arbitrators are just as qualified to interpret statutes governing personnel relations as they are to interpret labor contracts).

[40] *See* Edwards, *supra* note 5, at 925–26, 930. *But cf.* Getman, *Labor Arbitration and*

In other areas, we could capitalize on the substantive expertise and standards developed by well-established ADR mechanisms. For example, the experience and standards developed through decades of labor arbitration and mediation could prove particularly useful in settling disputes between nonunionized employees and their employers in cases of "unjust dismissal."[41] Labor arbitrators have developed fine-tuned standards for just-cause terminations, which they could easily transfer to the nonunion workplace, thus providing similar protection to nonunion employees. Similarly, the expertise developed over the years by commercial arbitrators could be used to settle other business disputes, which now often require years of litigation. We should also encourage more private parties to accept binding arbitration voluntarily. Recently, the SEC and the securities industry developed a system of securities arbitration used in thousands of securities law cases.[42] If this system is fair to investors and to broker-dealers, perhaps we should permit investors to commit themselves by contract to binding arbitration.

Additionally, the qualities of labor arbitration that make it so successful in the context of collective bargaining are readily transferable to other fields of law. The presence of a skilled neutral with substantive expertise, the avoidance of issue-obscuring procedural rules, the arbitrator's freedom to exercise common sense, the selection of arbitrators by the parties, and the tradition of limited judicial review of arbitral decisions — factors that make arbitration superior to litigation in labor cases — would make arbitration superior to litigation in other contexts as well. Although the labor context has the benefit of a collective bargaining agreement providing rules not subject to arbitrary change by one party,[43] the experience with federal employees demonstrates that arbitration can achieve substantial benefits even when it is limited to the interpretation of rules imposed unilaterally.[44] Perhaps arbitration could prove useful in moderating disagreements between citizens, in resolving grievances of citizens

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Dispute Resolution, 88 YALE L.J. 916 (1979) (suggesting that labor arbitration owes its success to the collective bargaining relationship).

[41] There has been a movement in state courts to protect even nonunionized employees from unjust dismissals. *See* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1931 (1983); Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

[42] *See* Katsoris, *The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279 (1984). In Wilko v. Swan, 346 U.S. 427 (1953), the Supreme Court held arbitration agreements between investors and broker-dealers nonenforceable. Under SEC rule 15c2-2, such arbitration agreements are illegal. Hence, in order for arbitration to be effective in the securities area, either Congress must change the law to permit arbitration agreements or the procedures developed by the industry must be attractive to securities plaintiffs.

[43] *See* Getman, *supra* note 40.

[44] *See* Edwards, *supra* note 5, at 932.

against social service agencies, and in resolving complaints of prisoners over conditions of confinement.

Finally, there are some disputes in which community values — coupled with the rule of law — may be a rich source of justice. Mediation of disputes between parents and schools about special education programs for handicapped children has been very successful. A majority of disputes have been settled by mediation, and parents are generally positive about both the outcome and the process.[45] At issue in these mediations is the appropriate education for a child, a matter best resolved by parents and educators — not courts.[46] Similarly, many landlord-tenant disputes can ultimately be resolved only by negotiation. Most tenant "rights" are merely procedural rather than substantive. Yet tenants desire *substantive* improvement in housing conditions or assurances that they will not be evicted. Mediation of landlord-tenant disputes, therefore, can be very successful — often more successful than adjudication — because both parties have much to gain by agreement.[47]

In both of these examples, however, the option of *ultimate* resort to adjudication is essential. It is only because handicapped children have a statutory right to education that parent-school mediation is successful. It is only because tenants have procedural rights that landlords will bargain at all.

ADR can thus play a vital role in constructing a judicial system that is both more manageable and more responsive to the needs of our citizens. It is essential — as the foregoing examples illustrate — that this role of ADR be strictly limited to prevent the resolution of important constitutional and public law issues by ADR mechanisms that are independent of our courts.[48] Fortunately, few ADR programs have attempted to remove public law issues from the courts. Although this may merely reflect the relative youth of the ADR movement, it may also manifest an awareness of the danger of public law resolution in nonjudicial fora.

IV. OVERRIDING CONSIDERATIONS

Apart from the issues concerning the appropriate application of ADR mechanisms, two additional overriding considerations should affect the employment of ADR. One has to do with research and appraisal, the other with the training and expertise of those who will serve as neutrals in ADR systems.

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[45] *See* L. SINGER & E. NACE, MEDIATION IN SPECIAL EDUCATION: TWO STATES' EXPERIENCES (1985).

[46] *See id.* at 15.

[47] *See* Janes, *The Role of Legal Services Programs in Establishing and Operating Mediation Programs for Poor People,* 18 CLEARINGHOUSE REV. 520, 521 (1984).

[48] In order to ensure that public law issues are not resolved in private fora, we must permit litigants who raise issues of public or constitutional law to use courts even if private ADR systems have already settled the dispute. *Cf.* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (holding that a title VII claimant does not waive his right to proceed in federal court by virtue of an adverse decision in grievance-arbitration).

Because the ADR movement is still in the formative stage, there is much to learn about the feasibility of alternatives to litigation. ADR is, as yet, a highly speculative endeavor. We do not know whether ADR programs can be adequately staffed and funded over the long-term; whether private litigants will use ADR in lieu of or merely in addition to litigation; what effect ADR may have on our judicial caseload; whether we can avoid problems of "second class" justice for the poor; and whether we can avoid the improper resolution of public law questions in wholly private fora. In light of these and other uncertainties about ADR, we should continue to view alternative dispute resolution as a *conditional venture*, subject to further study and adjustment. Every new ADR system should include a formal program for self-appraisal and some type of "sunset" arrangement to ensure that the system is evaluated after a reasonable time before becoming permanently established.

In addition to continued research and appraisal, we must ensure the quality of the suddenly emerging ADR "industry." Most participants in the ADR movement have joined with pure motives, but this is not true of everyone. There are now a number of self-proclaimed ADR "experts," with business cards in hand and consulting firms in the yellow pages, advertising an ability to solve any dispute. Unfortunately, those who seek to prey on a new idea may wreak havoc with our systems of justice and destroy the legitimacy of the ADR movement at its inception. One way to limit this problem is to train potential neutrals to ensure their expertise in both *substantive* areas and in dispute resolution *techniques*.

There are a number of ADR proponents who appear to believe that a good neutral can resolve any issue without regard to substantive expertise. Our experience with arbitrators and mediators in collective bargaining proves the folly of this notion. The best neutrals are those who understand the field in which they work. Yet, the ADR movement often seeks to replace issue-oriented dispute resolution mechanisms with more generic mechanisms without considering the importance of substantive expertise.[49]

Some would respond that judges are generalists and yet we trust our state and federal judiciary to resolve a broad range of disputes. This argument, however, is deceptive because judges *are* specialists in resolving issues of law. Law aims to resolve disputes on the basis of rules, whereas alternative dispute resolution mechanisms turn to nonlegal values.[50] If disputes are to be resolved by rules of law, the legal experts designated by our state and federal constitutions — that is, the judges — should resolve them. If nonlegal values are to resolve disputes, we should recognize the need for substantive expertise.

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[49] *See* Edelman, *supra* note 1, at 138–39.

[50] I recognize that legal values may not be wholly absent from ADR mechanisms. *See* Eisenberg, *Private Ordering Through Negotiation*, 89 HARV. L. REV. 637 (1976)

As we reflect, above all we must remember that the overarching goal of alternative dispute resolution is to provide equal justice to all. "If . . . reform benefits only judges, then it isn't worth pursuing. If it holds out progress only for the legal profession, then it isn't worth pursuing. It is worth pursuing only if it helps to redeem the promise of America."[51] So long as this remains the paramount goal of ADR and we continue to focus on the essential role of public values reflected in law, the progress of the ADR movement in the next decade will surely surpass that of the last.

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[51] Higginbotham, *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134, 138 (1976).

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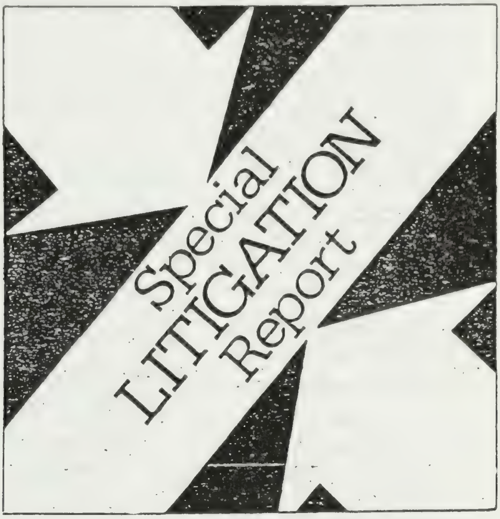

In Choosing ADR, the People, As Well as the Problem, Count

BY MARGUERITE MILLHAUSER
Special to The National Law Journal

ONE OF THE KEY features of alternative dispute resolution (ADR) is its adaptability. Rather than forcing every problem into the somewhat narrow confines of the traditional adversary system, ADR provides a wider range of mechanisms that allow for greater flexibility. These include mediation, minitrial, summary jury trial, neutral fact-finding and various combinations tailored specifically to the case at hand.

The benefits of ADR's flexibility are maximized when the choosing of an approach takes into account not only the nature of the problem but also the realities of the participants and their perhaps unspoken interests and objectives.

Most people are familiar with an incident that gave rise to a vicious legal battle in one case and was resolved through amicable discussion among the parties in another. Different means of dispute resolution may have been used in each case, based not so much on the nature of the incident but, more likely, on the nature of the people involved in the incident.

In determining which of the various alternative methods of dispute resolution to use in a particular case, one critical concern is the people involved. This factor cannot be assessed in advance of the particular controversy and is likely to remain in a state of flux throughout the dispute. Thus, while attempts can be made to categorize cases amenable to ADR, they should not be viewed as definitive. Nor should such categorizations replace a case-by-case analysis that evaluates the circumstances and motivations of the parties — institutional or individual — involved in or related to the controversy.

These circumstances and motivations often provide the greatest insight into the goals sought and the most effective approach to achieving those results. For that reason I suggest, as part of the review to determine the ADR potential of a case, that a "people analysis" be undertaken along with the more-typical legal and factual analysis.

The data obtained from this multifaceted review is likely to illuminate the problem more fully, and help the parties assess which of the mechanisms for resolving disputes is likely to be most effective. In the process, and as a result of focusing on their own more-general goals and those of their opponents, the participants may even rethink their positions and devise more innovative approaches to solving the problem.

In short, the availability of ways to resolve disputes other than litigation provides a degree of flexibility that enables lawyers and clients to expand the scope of their inquiry. Knowing that many ways exist through which to seek satisfaction of a client's interests, the lawyer can explore with the client aspects of the problem that traditional processes may not be equipped to address. Understanding those aspects, even more than the particular procedure used, may often be critical to satisfactory resolution of the dispute.

This article attempts to provide a framework within which the broader

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Choosing Litigation Alternatives

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more people-oriented inquiry can be conducted. Some of the questions posed may seem obvious and already included in many lawyers' repertoire. What is significant in those instances is not the questions themselves, but the weight given to the answers in determining the nature of the problem and how best to respond to it.

It is a matter of learning to put the legal issues in whatever position is dictated by the circumstances. In some cases, this may mean that the legal issues are virtually irrelevant, while in other cases they may continue to be of utmost importance. And often, the significance of the legal considerations will lie somewhere between those two extremes. An essential skill demanded of lawyers is the ability to distinguish among these different situations and respond accordingly.

Framework for Case Analysis

The questions set forth below are intended to elicit information considered important to a broad understanding of legal problems. The questions should be adaptable to and valuable in almost every circumstance. The questions should be answered from the perspectives of each party to the controversy. This may be done by going through the entire series of questions by participant or by going through every participant in response to each question.

> A lawyer should develop profiles of the key players in the dispute. In some cases, attorney profiles should be made as well.

Who are the participants with direct involvement in the event or events giving rise to the controversy, and with decision-making authority and/or responsibility?

☐ Name.
☐ Age.
☐ Physical description.
☐ Occupation.
☐ Job title and description.
☐ Economic situation.
☐ Personality.
☐ Personal (family) history.
☐ Relationship to other participants.
☐ Geographic location.
☐ Prior history of involvement in legal matter.
☐ Obligations to third parties.
☐ Degree of autonomy.

The goal of this question is to develop a personal profile on the key players at every level of the controversy. In some situations, this may also include the lawyers representing the various parties. With these profiles it will be easier to develop an understanding of how the problem is perceived on all sides as well as how different responses, proposals and actions are likely to be received.

People process information against a background of prior experience. The more that is known about that prior experience, the easier it is to anticipate reactions and prepare accordingly.

What entity or organization, if any, are the participants employed by?

☐ Name.
☐ Geographic location.
☐ Size (in personnel, revenues and other relevant aspects).
☐ Description of management.
☐ Governing philosophy (as stated and in practice).
☐ Future plans and expectations.
☐ History of involvement in legal problems.

This question is designed to develop a profile of the organization involved, which will provide the framework within which the individuals involved are operating and an understanding of the entity's independent motivations, expectations and needs.

If, for example, a corporation or agency has plans that will be affected by resolution of the matter, it is important to know and understand the significance of those plans. Such knowledge will increase understanding of the problem's scope and the range of possible solutions. It also may explain why a proposal that makes perfect sense on its face meets with strong resistance from the other side.

Obviously, if such information were known, most lawyers would factor it into their decision-making. Thus, questions should be asked at the outset to develop such facts independent of the factual development typically undertaken concerning the circumstances of the particular matter in question.

What is the stated controversy?

☐ Facts (when, where, what, how and why).
☐ Sources of information.
☐ Reliability of information.
☐ Identity of those with knowledge of controversy.

This is the starting point for most inquiries into legal disputes — to find out what happened. The difference in this context is that client and counsel must take the time to answer this question from the perspectives of the other participants. By forcing consideration of the events from other sides, this process enables counsel and client to develop a broader view of the situation.

What are the stated positions of the following?

☐ People with direct involvement.
☐ Those with decision-making authority and responsibility.
☐ The organizations involved.
☐ Any other potential stakeholders.

Like the third question, the purpose of this one is to enable counsel and client to develop an appreciation for all sides of the problem and thereby understand any potential weaknesses in their position and the potential strengths of the other parties' position(s). In the process of answering this question, it is helpful to have the client state the case as though he or she were the opposing party and to have counsel respond as though he or she were counsel for that party.

By including the positions of all individuals, entities and potential stakeholders it is possible to identify conflicting interests on one's own side as well as on opposing sides that may affect how the matter proceeds.

What are the underlying interests (real and perceived) of each party involved?

The purpose of this inquiry is to identify objectives that may not be apparent in the stated positions of the participants. For example, there may be concerns about reputation or recognition subsumed in a claim for money damages or a desire for retribution in a refusal to pay monies owed. When these and other unspoken interests are articulated, it is easier to identify both potential new avenues for seeking solutions and those avenues that may effectively be precluded.

The interests analysis encouraged here is similar to that used in the "getting to yes" — or principled — approach to negotiations. The difference is that at this preliminary stage it is undertaken in an effort to get a sense of the range of possibilities in terms of

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substance and procedure so that an appropriate course of action can be charted. Interests may or may not prove to be a basis from which to pursue resolution.

What are the legal issues raised by the controversy, and what is the significance of the legal issues to resolving the stated controversy and satisfying underlying interests?

The first part of this question is self-explanatory although again there is an advantage to going through the exercise of stating the issues from each party's vantage point. The second part of the question is intended to bring into focus the role of the legal issues in resolving the problem. This is designed to avoid the tendency to get lost in the legal nuances and lose sight of the overall objectives. To the extent certain legal issues appear controlling, it may be advisable to take the next step and evaluate the likelihood of success on the merits of those issues.

What practical considerations are involved, and what is the significance of the practical considerations to resolving the stated controversy and satisfying underlying interests?

☐ Financial considerations.
☐ Time limitations.
☐ Physical impediments.
☐ Geographical constraints.

The thrust of this question is whether there are factors external to the merits, the interests and just about anything else substantive that may affect how parties respond and behave. This would include such things as the ability to sustain the cost of litigation, the need to resolve the matter quickly (or slowly) to accommodate other capital needs, the inconvenience of pursuing resolution in a particular geographical setting, etc. Once these factors are identified, an effort should be made to assess how they are likely to affect the problem and solution.

What emotional and personality issues affect the controversy, and what is the significance of these issues to resolving the stated controversy and satisfying underlying interests?

This question is intended to allow the information elicited in response to the first question to be integrated with responses to certain subsequent questions. It also attempts to identify feelings that are likely to affect the ways others are willing to participate and respond.

What means of dispute resolution are available or can be created to respond to the range of considerations identified in the responses to the questions above and what are the relative advantages and disadvantages of each?

In response to this inquiry, counsel should be prepared to identify the various approaches to dispute resolution and hypothesize about how each approach may work under the circumstances of the particular case. These approaches include proceedings involving third-party decision-makers (such as arbitration and private judges), procedures involving third-party facilitators (such as mediation and minitrials) and procedures dependent on the parties themselves (such as negotiation).

This exercise helps the counsel and client focus on the degree of outside intervention required and the importance of precedent and other matters likely to determine which approach will be most effective. The likely amenability of other parties to the use of alternative procedures should be part of this analysis. Consideration also should be given to any information from other parties that may be necessary in order to make such an assessment.

What are the barriers, if any, to communicating with other involved parties about the nature of the problem, appropriate dispute resolution mechanisms for resolving the problem and solutions to the problem?

This question is designed to provide a framework for considering the appropriate next step. Understanding of the avenues of communication available to the parties and to counsel is critical for this purpose. An overture made to the wrong person or at the wrong time can doom a case to months of unproductive skirmishing. Thinking through the communication facets of the problem may avoid such a result.

> The legal system now functions in a way that directs attention toward details, often causing a loss of overall perspective.

This framework for case analysis is intended to help counsel and client elicit a more complete picture of the problem they are seeking to resolve. Once that is accomplished, it is incumbent on the participants to maintain this broad view while at the same time attending to the specifics of the problem identified.

Currently, the system functions in a way that quickly diverts the attention of counsel to details, often causing a loss of overall perspective. To the extent the importance of this bird's-eye view is recognized, arrangements can be made to assure that someone — either counsel or client — assumes responsibility for maintaining it.

In addition, attention must be paid throughout to the "people" dimension as circumstances change and new decisions are made. Again, acknowledgment of the significance of this component is a first step in assuring that responsibility for analyzing and monitoring is assumed. While these aspects of legal problems are less recognized than others, they are important to the determination of solutions as well as to the selection of the appropriate means of achieving those solutions.

1. OVERVIEW OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION

B. Federal Government

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FEDERAL AGENCY USE OF "ADR": THE EXPERIENCE TO DATE

by

Charles Pou, Jr.[1]

I. OVERVIEW

We have seen a striking growth in recent years of controversies that manifest themselves in governmental proceedings, regulatory and other agency decisions, and court actions challenging administrative actions or seeking enforcement of legislative or regulatory requirements. Whatever the accuracy of recent statements about a general "litigation crisis," one cannot deny that federal agencies are involved in far more disputes than ever as parties (even on a *per capita* basis),[2] and decide far more cases than the federal courts--hundreds of thousands annually. Many government decisions--ranging from disability applications to civil rights cases, from health and safety enforcement to disputes under hundreds of grant, loan and procurement programs--now require resource-intensive procedures that are expensive, cause delay, reduce the chances of consensual resolution, and disrupt planning. While a few agencies have begun to try ways to shape alternative means of dispute resolutions (ADR) to meet their needs, so far these efforts have been rather isolated, diverse and decidedly experimental.

Although many of these agencies were created as a result of disaffection with formal court processes and are now criticized themselves as unresponsive and hamstrung by procedural red tape,[3] surprisingly little thought has gone into their use of "the gentle arts of persuasion." Those interested in using ADR techniques have tended to focus their attention more on areas such as private labor, family and consumer disputes than on governmental uses of ADR.

To be sure, government agencies created to relieve courts of burdensome litigation may already represent a few steps away from formality. More than a decade of environmental mediation, and the work of the Federal Mediation and Conciliation Service (FMCS) and the Department of Justice's Community Relations Service (CRS), evince some agencies' special interest in informal alternatives. A few more agencies, several discussed elsewhere herein, have begun to experiment. Several states have created central dispute resolution agencies to increase uses of mediation and related devices in public disputes. Still, the trend is hardly uniform--some experiments have been unsuccessful, available processes are not always used, and FMCS's efforts to extend its work into non-labor areas have been largely abandoned for budgetary reasons. Cases where government agencies now choose to employ ADR techniques comprise but a small fraction of their decisions.

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[1] The author is a staff attorney at the Administrative Conference of the United States responsible for its program in dispute resolution. Unless otherwise stated, the opinions herein are his and do not necessarily represent the views of the Conference.

[2] The number of lawsuits in which the U.S. was a party rose from 25,000 new cases in 1970 to 64,000 in 1980. Smith, *Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government*, 1984 Mo. J. of Dis. Res. 9, 21.

[3] The ABA's prestigious Commission on Law and the Economy described shortcomings of the administrative process in *Federal Regulation: Roads to Reform* (1979), as follows:

> We share the general view that many administrative procedures are too slow, costly and cumbersome. As a result, vital economic interests concerned with capital formation, plant modernization and business expansion are severely handicapped, and reforms necessary for the protection of workers and consumers are too long postponed. These delays and excessive costs have resulted, in considerable part, from the fact that administrative procedures, initially developed as a safeguard against the threat of regulatory abuse, have come to mimic the judicial process, with inadequate regard for the flexibility available under existing statutes. Improved procedures will serve all citizens, both as consumers and producers.

II. ISSUES CONFRONTING AGENCY USES OF ADR

It is worth noting initially that agencies frequently are not well situated to terminate controversies without full judicial or administrative airing of all sides. Disputes involving the government often are more complex, and have far greater impact and precedential value, than most individual consumer, employment or negligence cases. Where the meaning of civil rights law or the validity of a complicated environmental regulatory scheme is at issue, the interest in satisfying all parties and avoiding lengthy, expensive controversies may be outweighed by a need for authoritative opinions definitively explicating legal responsibilities, for open processes to develop social policies, and for executive flexibility. Agency officials' efforts to reduce formalization are complicated by a variety of factors that seldom trouble private parties; many are apprehensive over ADR because of these uncertainties, as well as others like the following:

(1) *Finality often cannot be assured.* Proposed regulations, orders, and settlements often are subjected routinely to multiple layers of intra-agency and even inter-agency review, public comment and judicial second-guessing, a situation that can only discourage other parties from negotiating with federal officers whose agreements' finality cannot always be assured. Means must be found to ensure that top decisionmakers are involved in, or apprised of, sensitive negotiations, and to streamline agency and OMB review of negotiated rules and orders.

(2) *Public officials may feel less able to assess their interests and strike bargains* in some cases than would individuals or corporations, since public duties are often more nebulous and susceptible to second-guessing by Congress or the press. To take an extreme example, the Rita Lavelle case cast a long shadow on agency settlement motives. More mundane, but in some ways more worrisome, is the result of a recent minitrial leading to a settlement by the Army Corps of Engineers of a large construction dispute, where subsequent criticism by regional personnel spurred an investigation by the agency's inspector general. The inspector general's report (not publicly available) reportedly was favorable to the process, but such investigations, unless infrequent, would almost certainly chill all parties' interest in experimenting with ADR methods in place of seeking the "insulation" of a "regular" decision.

(3) *Public access and other procedures imposed by statutes* like the Freedom of Information Act, Federal Advisory Committee Act, and Administrative Procedure Act create duties that can inhibit an atmosphere conducive to negotiation.

(4) *Procedural restrictions are often mandated by court decision.* To cite but one example, limits on *ex parte* contacts in all formal proceedings and even some informal rulemakings would require changes in judicial doctrine or statute for use of informal alternatives.

(5) *The General Accounting Office has prohibited use of outside arbitrators to determine liability* of the United States, though permitting it where only the amount was subject to arbitration. This prohibition has been frequently criticized,[4] and the Administrative

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[4] *E.g.*, Administrative Conference Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 C.F.R.§ 305.86-3; Harter, *Points on a Continuum: Dispute*

Conference has called on Congress to act in many cases to authorize arbitration of various claims. Representatives of Justice and GAO have also suggested that, in some instances, delegation of a governmental decision to a private arbitrator may raise constitutional questions.

(6) *Budget limits, and procurement procedures* imposed by the Federal Acquisition Regulation and the Competition in Contracting Act, affect acquisition of the services of private mediators and arbitrators. While this has positive aspects--including encouraging development of in-house expertise, enhancing inter-agency cooperation (e.g., with FMCS or CRS), and ensuring quality work in a field with some "experts" of dubious credentials--it may delay, complicate, and even prevent agency action in some instances where ADR would help.

(7) *The unclear extent of an agency official's authority to bind his or her successors* in a settlement adds uncertainty.

(8) *The Attorney General's recent memorandum broadly discouraging use of special masters* in district court cases involving the government may well have the result of inhibiting ADR use in many cases otherwise susceptible to mediation or similar methods. Some refinement of its provisions may well be advisable.

(9) *The role of judicial review often presents fundamental problems.* A prime tenet of ADR is that an initial investment of time and money to resolve a dispute consensually is likely to avoid the cost, delay, and other troubles associated with litigation. Many agencies' negotiated rules and other settlements, however, will be subject to some judicial review--for example, where (1) a court must approve a settlement, (2) a party changes its mind or cannot control its constituents, or (3) an affected party not participating directly in the negotiations questions the agency's jurisdiction, alleges inadequate representation in the negotiating process, or otherwise challenges the legality of the settlement. Should the standard of review be relaxed in light of consensus? If so, how does one decide whether representation has been adequate and when a consensus has been reached? Can the agency record, which the courts use as a basis for review, be curtailed in light of the need for fast, confidential negotiations? To what degree should a mediator's confidentiality be protected? The implications of these questions are just beginning to be worked out.[5]

It should be clear that ADR techniques are hardly cure-alls and their costs can be substantial. Still, they present government agencies with clear opportunities to resolve disputes more quickly and satisfactorily, reduce rancor in their dealings with some regulated parties, and stand as counterweights to a perilous trend toward procedural complexity.

III. SURVEY OF GOVERNMENTAL USES

A. *General.* Some agencies have begun to use ADR techniques in certain proceedings for determining a regulated party's rights or liabilities. Few patterns emerge from these isolated cases. Congress, unlike several state legislatures, has not established any central agency with the task of furthering use of ADR in government decisions. It has called for arbitration in several instances. Some processes are simple, like the Federal Energy Regulatory

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Resolution Procedures and the Administrative Process, 1986 Reports and Recommendations of the Administrative Conference of the United States ---- (1987); Behre, *Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Assistance and Acquisition Contracts?*, 16 Public Con. L. J. 67, 92 (1986).

[5] A recent article by Chief Judge Patricia Wald of the U.S. Court of Appeals for the District of Columbia Circuit (10 Colum. J. Envtl. L. 1 (1984)) contains a perceptive discussion of several, as does a reply by Philip Harter (11 Colum. J. Envtl. L. 51 (1986)). The Administrative Conference has addressed some of these issues in its recommendations discussed briefly below.

Commission's and Occupational Safety and Health Review Commission's appointment of a "settlement judge" for many cases. Others, like the Commodity Futures Trading Commission's three-tiered process for reparations cases, are fairly elaborate. Most ADR techniques have been applied primarily to smaller, non-precedential disputes, though minitrials and negotiated rulemaking have succeeded in several large, controversial cases. The Environmental Protection Agency is beginning to explore ways to emphasize ADR in enforcement cases and in voluntary cleanups of hazardous waste dump sites. Also, the statute authorizing EPA to register pesticides requires the use of arbitrators from an FMCS roster to determine the amount of compensation to be paid by an applicant when it makes use of the data submitted by a prior applicant. The Grant Appeals Board at the Department of Health and Human Services and a few others have provided trained staff mediators to help resolve some disputes. The Merit Systems Protection Board, which hears federal employees' grievances, now offers a voluntary, simplified procedure that provides a rapid decision and possible mediation by presiding officials. The Department of the Navy and the Army Corps of Engineers have established minitrial programs, and resorted to them in several instances to avoid protracted procurement litigation. The Department of Justice has begun a pilot project to use minitrials for some contract cases, though only one dispute has been thus handled so far.

It would be misleading to read too much into the variety of initiatives noted here.[6] Several of them are experimental or have been used only a handful of times. Nevertheless, interest is growing in expanding the uses of ADR. The Department of Justice, the Administrative Conference, and a few additional agencies have begun exploring other possibilities. The National Institute for Dispute Resolution (NIDR) has begun incentive grants to stimulate state action. In addition, the ABA Section of Administrative Law has established a Committee on Dispute Resolution, and CPR a Governmental Disputes Committee. Their efforts should be useful in helping agencies take the next steps to implement these methods in the various kinds of activities they engage in.

B. *Government Contracts*. Many procurement disputes appear ripe for ADR. The time and cost of resolving these cases have risen dramatically in the last decade. Agencies' boards of contract appeals, established as relatively quick, uncomplicated alternatives to congested courts, are now burdened with vastly increased caseloads and formalized procedures. Cases once handled by parties *pro se* are now heavily lawyered. The boards now generally take two to four years, and often longer, to decide claims.

The minitrial, of course, has been the alternative most commonly used to date in these cases. The Army Corps of Engineers and the Navy have each used the process to resolve several cases, and the Departments of Justice and Energy and NASA have also used this settlement tool with great success. The Corps has also used an informal, internal review process and held training sessions for legal personnel in problem solving and dispute resolution. Nonetheless, it is noteworthy that, while minitrials have invariably resulted in settlements, they have been used in fewer than a dozen of the hundreds of contract cases terminated annually in recent years. Clearly, greater efforts are needed to implement the minitrial (or a variant), or to supplement it with training or other alternatives.

Of course, in similar private sector disputes, arbitration is often the methods of choice. The Administrative Conference has recognized the value of arbitration in many of these cases, calling on Congress to authorize executive branch officials to agree to voluntary arbitration of many of these disputes. Corps of Engineers officials have expressed interest in working with the Conference and others to develop a pilot program for arbitrating some construction claims.

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[6] Most of the procedures discussed herein as well as those of some additional agencies, are described in greater detail in Philip Harter's *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1986 Reports and Recommendations of the Administrative Conference ---- (1987), as well as a variety of other sources. Anyone interested in obtaining more detailed information on these programs may contact the agency involved or the Office of the Chairman of the Administrative Conference.

C. *Employment/Community.* FMCS assists parties to private labor disputes through mediation and conciliation, and also mediates complaints brought under the Age Discrimination Act. During the 1970's, FMCS also began helping resolve a variety of other kinds of cases, but most of these efforts ceased in the 1980's.[7] The Federal Services Impasse Panel in the Federal Labor Relations Authority works to assist in negotiations between agencies and exclusive representatives of federal employees. The Panel has broad discretion to fashion appropriate procedures case-by-case, and has made considerable use of factfinding, arbitration, "med-arb" and written submissions. CRS has compiled a distinguished record mediating racial, ethic and other community disputes, as well as helping communities develop local mechanisms for dealing with future disputes.

The Merit Systems Protection Board, which hears grievances of federal employees, sought in 1981 to meet Congress' call for alternative appeals procedures like conciliation, mediation, arbitration and similar methods mutually agreeable to the parties in these cases. It created a "Voluntary Expedited Appeals Procedure" with a quicker decision, summary procedures and possible mediation by an MSPB presiding officer who has received a short (albeit special) training course. This process has been used with some success in a few of the MSPB's regional offices (especially the Chicago region) and nearly ignored in several others.[8] Following an initial push in 1982 with agencies, employees groups and regional offices, about 2% of MSPB cases were handled under the expedited system; recent data suggest that this rate has since fallen.

D. *Environment.* The Environmental Protection Agency has been active recently in taking advantage of ADR, and Justice's Land and Natural Resources Division has begun to consider its use. Congress has relied on arbitration to resolve claims against a trust fund created under the "Superfund" legislation (Comprehensive Environmental Response, Compensation and Liability Act). Decisions are made by a Board of Arbitration selected by the Administrator of EPA in accordance with procedures used by the American Arbitration Association. Structured negotiation techniques have also been used in allocating liability for cleanups of some hazardous waste sites under Superfund, partly as a result of recommendations to EPA by the Administrative Conference.[9] EPA has recently issued draft guidance encouraging use of ADR in enforcement cases. This guidance, drafted by the Office of Enforcement and Compliance Management, includes intra-agency forms and model agreements and procedures for implementing available ADR devices.

E. *Consumer Protection.* The Commodity Futures Trading Commission offers a civil complaint resolution system for customers of commodities brokers. This "reparations" system was created by Congress in 1977. An innovative three-tier process was devised by the CFTC in 1982 pursuant to new congressional leeway intended to reduce a sizeable backlog and encourage informality.[10] The new rules created three available adjudicatory routes: (1) a voluntary procedure, (2) a summary procedure for claims less than $10,000, and (3) a formal procedure. The voluntary route, which can be used where all parties agree, is the simplest and most experimental. No findings of fact or law are expected, and there is no right to intra-agency or judicial review. The summary, small claim procedure envisions a paper hearing based on submissions in the form of verified statements, or occasionally a telephone or oral hearing with opportunity for cross-examination. Both voluntary and summary proceedings are conducted by CFTC employees known as "Judgment Officers." The formal procedure generally envisions a trial-type proceeding conducted by an ALJ, who may be aided by a "Proceeding Officer" to handle discovery and other matters. The rules, which contain several other innovations intended to contribute to an expeditious resolution, have apparently been only partly successful. In recent years, the CFTC's reparations caseload has actually been falling, due largely to statutory changes reducing jurisdiction and the rapid growth of the National Futures Association's new arbitration program.

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[7] Barrett, *The FMCS Contribution to Nonlabor Dispute Resolution*, Monthly Labor Rev 31 (Aug. 1985).

[8] The early experimental program was evaluated, in general favorably, in Adams and Figueroa, *Expediting Settlement of Employee Grievances in the Federal Sector*, Report to the Administrative Conference (1985), which found that the process expedited decisions, was satisfactory to most parties, and enhanced settlement chances.

[9] Recommendation 84-4, *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 C.F.R. § 305.84-4.

A few agencies have sought to promote the use of private sector resolution of consumer complaints. A controversial Federal Trade Commission consent decree with General Motors Corporation, for example, is responsible for a nationwide system of private mediation and (if necessary) Better Business Bureau arbitration of auto warranty complaints. The Securities and Exchange Commission, of course, oversees a stock exchange program involving consumer grievances, and is encouraging implementation of a uniform arbitration code for disciplinary cases and disputes between dealers and customers.

F. *Grants.* ADR methods like negotiation may be particularly useful in developing and enforcing many rules and conditions for administering programs affecting state and urban interests, including any federal grant and assistance programs surviving into future budgets. States, with their unique position in the federal system, should certainly benefit from processes that emphasize participatory decisionmaking by directly affected interests. Agencies so far seem not to have tested this technique formally in grant or similar cases, though negotiations of various sorts have occasionally been employed in these programs, as in development of federal-state agreements concerning the administration of the Supplemental Security Income program. Several recent "regulatory reform" bills--none passed--would have relaxed FACA restrictions to reduce obstacles to face-to-face negotiation by agencies with state and local governments and their representatives.

To date, perhaps the most widely noted effort in this area has been that of the Departmental Grant Appeals Board at the Department of Health and Human Services to offer mediation services to disputants and to train its own personnel in these skills. While this mediation alternative has not been widely sought by parties before the Board, Board members believe that these skills (in conjunction with related processing tools) have helped them reduce a large backlog and decide almost all cases--many involving regulatory and accounting questions affecting millions of dollars--in six to nine months.[11]

G. *Negotiated Rulemaking.* Mediation and negotiation methods are beginning to be used, and would appear to offer considerable possibilities, in one of the most fundamental administrative activities--agency procedures for adopting rules to implement regulatory programs established by Congress. While the thirteen-year effort of the Food & Drug Administration to set a standard for the amount of peanuts in peanut butter is admittedly an extreme case, environmental, occupational safety, health care, and a variety of other proceedings may go on for years and are routinely challenged in court. Today's rulemaking process often encourages parties to dig in and take extreme positions, and provides little chance for accommodating conflicting interests.[12]

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[10] Marianne Smythe takes a closer look at *The Reparations Program of the Commodity Futures Trading Commission* in a draft report to the Administrative Conference, January 1987.

[11] Cappalli, *Model for Case Management: The Grant Appeals Board*, 1986 ACUS --- (1987).

To cut through this red tape, the Administrative Conference has recommended an alternative procedure known as "negotiated rulemaking." Under this process, agencies, aided by a "convenor" to organize negotiations, identify and bring together representatives of affected interests to negotiate, pursuant to specified safeguards, the text of proposed rules which are then published for public comment. Negotiated rulemaking is premised on the notion that providing opportunities and incentives to resolve regulatory issues through negotiation will yield a simpler, quicker process, lead to less litigation, and produce rules that are more acceptable to the persons they affect.[13]

The Environmental Protection Agency, the Occupational Safety and Health Administration, and the Federal Aviation Administration have used it, with several others (including the Department of the Interior, Nuclear Regulatory Commission, and Federal Trade Commission) now starting to experiment with the procedure. FAA and EPA report great success with negotiated rulemaking. FAA's recently completed proceeding on flight and rest time requirements for airline pilots followed three contentious, and unfruitful, attempts over a ten-year period to revise a longstanding rule that had become outmoded. EPA has established a Regulatory Negotiation Project and is using the process extensively. Their successful use in areas involving the environment and the workplace, where controversy has prevailed, suggests that similar mediation efforts would work elsewhere. Several state agencies, including some from Alaska, Massachusetts, New Jersey, and Wisconsin, are exploring ways to use these procedures.

H. *Tort Claims.* The current Administration, the Department of Justice and the Administrative Conference have all called for greater use of ADR in tort claims.[14] The Conference, though not recommending any radical restructuring of the claims process under the Federal Tort Claims Act, has called for a number of changes in agency practices to reduce the incidence of "inappropriately adversarial responses to technical deficiencies, restrictive policies on information disclosure in connection with the pending claim, and less than fully fair and objective approaches to determining the merits and monetary value of a claim."[15] Claimants under the FTCA, which authorizes federal agencies to compensate persons injured by government actions in a variety of circumstances, are required to present claims to the responsible agency as a prerequisite for suit and give the agency a minimum of six months in which to settle them. Agencies exercise considerable settlement authority, subject to approval by Justice when the amount exceeds $25,000.

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[12] Typically, an agency itself will draft a proposed rule and circulate it for public comment; it must take these comments into account before publishing a final rule, and failure to do so can lead to reversal in court. This process represented a major step forward when codified in the Administrative Procedure Act in 1946, but subsequent judicial decisions, piecemeal congressional tinkering with additional procedures, and the near certainty that any major rule will end up in litigation have rendered it considerably more cumbersome and time-consuming than originally contemplated. Closer looks at these processes can be found in the Administrative Conference's *Guide to Federal Agency Rulemaking* (1983) and its *Federal Administrative Procedure Sourcebook* (1985).

[13] The procedures for negotiated rulemaking, as set forth in Conference Recommendations 82-4 and 85-5 (1 C.F.R. § 305), are based largely on a report to the Conference by Philip Harter, *Negotiating Regulations: A Cure for Malaise* (71 Georgetown L.J. 1 (1982)), and a subsequent paper by Henry Perritt assessing the first few agency experiments with the process. The Conference has encouraged and assisted subsequent agency efforts to negotiate rules, organized informal interagency exchanges and hopes to publish a sourcebook for negotiated rulemaking that will compile background information, suggested procedures, and workable solutions to problems that agencies have encountered to date.

[14] An Administration task force, in its *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (Feb. 1986) strongly supported ADR. The group, chaired by Richard Willard, Assistant Attorney General for the Civil Division, endorsed experimentation with ADR as a means to encourage early settlement of tort claims, and called for greater receptivity to proposals to use ADR as a way to resolve tort cases.

The Conference has recommended several changes in the FTCA to facilitate settlements; it has also called for Justice, among other things, not to "exercise its statutory approval authority over large administrative settlements in a manner that would tend to discourage claims officers from making serious efforts to reach a fair and objective settlement with a deserving claimant." The Department's Civil Division, responsible for these matters, has so far declined to endorse most of the Conference's recommendations on grounds that they do not adequately take into account the true adversarial nature of the tort claim process. While a few agencies currently follow these recommended procedures--as by training claims personnel to provide complete information or use nonadversarial methods--much remains to be done to reduce doubts as to the fairness of a few agencies' claims handling processes.

I. *State governments.* With little fanfare, several states have been considerably more imaginative than the federal government in carrying out experiments with these dispute resolution methods. Their efforts are too numerous and diverse (and in many cases obscure) to discuss in detail here. Of course, public labor mediation or arbitration is more common at the state level, as are a variety of other uses for mediation and other ADR skills in particular states. These include following negotiated investment strategies to fix budgetary priorities, negotiating disputes over siting of industrial, hazardous waste or other facilities, and arbitrating some consumer and other claims. In at least five states, central dispute resolution agencies have been established, in part due to incentive grants by NIDR. The agencies are in Hawaii, Massachusetts, Minnesota, New Jersey and Wisconsin.[16] Their bureaucratic placement, missions and accomplishments vary considerably but they may generally be said to do one or more of the following jobs:

(1) Building agency and public awareness of dispute resolution options.

(2) Mediating disputes, or setting up mediation and negotiation programs.

(3) Screening controversies for ADR susceptibility.

(4) Consulting with interested state agencies.

(5) Initiating policy dialogues on selected public disputes.

(6) Suggesting legislation, and compiling rosters.

Several other state legislatures are considering bills that would establish similar offices elsewhere.[17]

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[15] Recommendation 84-7, *Administrative Settlement of Tort and Other Monetary Claims Against the Government*, 1 C.F.R. § 305.84-7.

[16] HI - Program on Alternative Dispute Resolution, Office of Administration, Director of the Courts. MA - Massachusetts Mediation Service, Executive Office for Administration and Finance. MN - Office of Dispute Resolution, Minnesota State Planning Agency. NJ - Center for Public Dispute Resolution, Public Advocate's Division of Citizen Complaints and Dispute Settlement. WI - Screening panel, chaired by Secretary of Labor, Industry and Human Relations.

[17] Some interesting aspects of the five state offices' limited experience to date are discussed in Susskind, *NIDR's State Office of Mediation Experiment*, Negotiation Journal 323 (Oct. 1986).

IV. THE ADMINISTRATIVE CONFERENCE AND AGENCY DISPUTE RESOLUTION

The Administrative Conference believes that the costs, delay and inefficiency that characterize much federal agency activity today should be treated as important public policy concerns in their own right and not merely as procedural afterthoughts to consideration of substantive regulatory issues. Therefore, the Conference has begun a program that has developed into the first focused look, under either public or private auspices, at the potential for use of consensual dispute resolution by administrative agencies.

The Administrative Conference is an independent agency of the federal government that seeks to encourage procedural innovation at both the legislative and agency levels. Chaired by a presidential appointee, the 101 members of the Conference include high-level representatives of most federal agencies as well as a substantial number of persons from outside the government who are scholars, members of the bar, or others having significant experience with respect to administrative procedure. Research is conducted by staff and consultants, with working committees of the Conference having responsibility for formulating recommendations based on research reports, information submitted by agencies and other sources, and experience and judgment of the members. The Chairman and his staff are continually engaged in efforts to aid agencies in improving their procedures by helping implement the recommendations of the Conference, by exchange of information, and by acting as a source of advice on good procedure.[18]

The Conference's recent efforts have sought to combine (1) a broad approach that might be called consciousness-raising among agencies about ADR with (2) more focused work to help individual agencies find practical ways to apply ADR approaches to specific regulatory problems. This begins with commissioned reports to serve as background for advice to agency decisionmakers. The staff and members of the Conference follow up by working directly with agency personnel, expert consultants and others who have key roles in regulatory programs. The Conference has tried to take advantage of its unique structure, which brings together key federal agency personnel with private citizens who are knowledgeable about the administrative process, to persuade agency officials to experiment with and adopt the procedural innovations encompassed in its recommendations.

Before undertaking its current ADR program, the Conference had already completed research leading to recommendations that advocated negotiating substantive rules and Superfund cleanups, making agency handling of tort claims less adversarial, and mediating grant disputes.[19] In its most successful previous ADR-related effort, the development of negotiated rulemaking as an important tool for federal agencies, the Conference's pioneering research and innovative recommendations, beginning in 1980, provided a major impetus for experimentation.

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[18] The statutory mission of the Administrative Conference is (1) to study all aspects of federal agencies' procedures; (2) to identify and analyze the causes of administrative inefficiency, delay and unfairness; and (3) to recommend to Congress or to the executive and independent agencies specific means of improving the qualify of administrative justice. 5 U.S.C. §§ 571-76.

[19] *See* Recommendations 82-4 and 85-5, *Procedures for Negotiating Proposed Regulations*, 1 C.F.R. § 305.82-4 and .85-5 (1986); 84-4, *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 C.F.R. § 305.84-4; 84-7, *Administrative Settlement of Tort and Other Monetary Claims Against the Government*, 1 C.F.R. § 305.84-7; and 82-2, *Resolving Disputes Under Federal Grant Programs*, 1 C.F.R. § 305.82-2. They were based in part on the following consultant reports: Philip Harter, *Negotiating Regulations: A Cure for Malaise*; Henry Perritt, *Analysis of Four Negotiated Rulemaking Efforts*, 75 Georgetown L.J. (1986), 1985 ACUS 637; Frederick Anderson, *Negotiation and Informal Action: The Case of Superfund*, 1985 Duke L.J. 261, 1984 ACUS 263; Philip Harter, *Points on A Continuum: Dispute Resolution Procedures and the Administrative Process*; George Bermann, *Administrative Handling of Monetary Claims: Tort Claims at the Agency Level*, 35 Case Western L. Rev. 509 (1985), 1984 ACUS 639; Ann Steinberg, *Federal Grant Dispute Resolution*, 1982 ACUS 137, published in Mezines, Stein and Gruff, *Administrative Law* (1983).

The first product of the recent program was Conference Recommendation 86-3, based largely on consultant Philip Harter's survey of dispute resolution procedures and the administrative process. The 1986 recommendation calls, among other things, for legislation authorizing voluntary arbitration of many agency disputes, and advises agencies on ways to take greater advantage of mediation, minitrials, settlement judges, organizational streamlining and other means now that their disposal--but not widely used in the federal government--to encourage settlement of many proceedings. It also describes situations where ADR is, or is not, likely to be useful.

In December 1986, the Conference adopted Recommendation 86-8, giving advice to agencies on procedures for obtaining the services of ADR "neutrals." This recommendation, resulting from a *pro bono* project by George Ruttinger of the law firm of Crowell & Moring, seeks to help agencies broaden the supply of qualified mediators and other neutrals, inside and outside the government, to provide services for federal agencies' use of ADR. It advises agencies on practical steps; addresses the qualifications that should and should not be required; encourages agencies to take advantage of opportunities to train and employ federal personnel as neutrals in resolving disputes; and recommends establishment of rosters of potential neutrals on which agencies could draw. It also addresses issues involved in government agencies' contracting for the services of private parties to serve as neutrals in mediations, negotiated rulemakings, minitrials and arbitration. A related Conference recommendation on case management as a tool for improving agency adjudication give advice to presiding officers and managers on using time guidelines and management systems to deal with slow cases, taking steps to define key issues early on, reducing parties' opportunity for procedural maneuvering, and using a variety of other methods to limit issues in contention and resolve disputes more expeditiously.[20]

Considerable implementation and related research efforts were initiated in late 1986. The Conference has started several additional projects, both general and agency-specific, including work with the boards of contract appeals and others on using minitrials in contract disputes, with EPA's enforcement staff on its new ADR guidance, and on legislation to create a pilot program for arbitrating some contract disputes. Studies now in progress include Professor Harold Bruff's exploration of constitutional and other legal issues potentially affecting government agencies' use of arbitration; Eldon Crowell's review of agencies' experiences with minitrials; and Professor Marianne Smythe's study of the innovative three-tiered system that the Commodity Futures Trading Commission uses to decide consumer complaints against brokers. Several agencies have contacted the Conference to begin exploring possible ADR uses in their programs. The Conference hopes to help several agencies develop rosters of potential "neutrals" for various kinds of proceedings, and to propose amendments to, or deviations from, the Federal Acquisition Regulation that will simplify agency processes for acquiring the services of ADR neutrals from outside the government. The Conference also hopes to begin new studies on the experiences of states that have established central dispute resolution agencies; the use of settlement judges by the Federal Energy Regulatory Commission; and issues presented by greater use of ADR in environmental enforcement cases.

The Conference has also begun to take advantage of its position in the government by sponsoring a colloquium bringing together key agency officials, members of Congress and the judiciary, and experts from outside the government to discuss the potential for alternatives to some traditional agency decisionmaking processes.

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[20] Cappalli, *Model for Case Management: The Grant Appeals Board*, 1986 ACUS --- (1987); Pou & Jones, *Agency Time Limits as a Tool for Reducing Regulatory Delay*, Report to the Administrative Conference (Sept. 1983).

V. STEPS TO INCREASE AGENCIES' ADR USE

Opportunities clearly exist to use ADR techniques to greater advantage, as in many tort claims and grant disputes, and in programs for enforcing civil penalties. In these and many other situations, imaginative resort to ADR methods is indicated. Agencies, the groups that deal with them, specialists in dispute resolution, and the academic community should work to explore the potential of these alternatives. For example:

(1) Statutory drafters should selectively encourage agency uses of ADR, including arbitration, and in any event should not routinely preclude them by specifying detailed procedures. Only a few statutes have actively encouraged ADR usage, such as the Civil Service Reform Act of 1978. Much more often they stand as a roadblock to reform.

(2) In some areas, Congress should relax statutory requirements, like the blanket limitation on agency use of arbitration that GAO has found.

(3) The effectiveness of expanded reliance on negotiation will depend in large part on the degree of support or opposition from Congress. Congressional oversight and other relevant committees should support and encourage these efforts, recognizing that negotiated solutions invariably involve compromises.

(4) Agencies should (a) seek out ADR opportunities; (b) do far more to obtain training for many decisionmakers and lawyers in negotiation and mediation skills, so that they can be alert to productive opportunities to use alternatives; and (c) solicit views of regulated persons on useful ideas for cutting red tape.

(5) Courts interpreting statutes with procedural requirements should be flexible with agencies' ADR initiatives. Many statutes are purposely vague, their drafters having agreed to have the executive agency fill in the contours. In such cases, agency authority to forgo trial-type processes should be recognized as long as constitutional rights are protected.

(6) Federal agencies and observers should seek to examine ADR experiences at the state level for lessons and examples.

(7) Experts in disputes resolution should work with administrative agencies, state and local governments, and others to identify particular decisions where informal alternatives merit a try, and work informally with interested agencies in putting alternatives into place.

(8) State and local governments, regulated parties, public interest groups, and others affected by agency actions should recognize that their interests are not always furthered by routine resort to adversary processes. They should cooperate with federal efforts to develop simplified procedures, encourage experimentation, and even exert pressure on agencies. For instance, since the APA permits anyone to petition an agency to commence a rulemaking proceeding, it may be argued that the petitioner can request the agency to commence a negotiated rulemaking. The petition process was largely responsible for the start of one successful EPA "reg neg" proceeding. Persons dealing with the government should use such tools imaginatively, even if only on the chance that a few agencies will occasionally prove receptive and benefit from the experience. They, and ultimately all, should benefit from a process whereby federal agency decisions are shaped by their participation and not imposed unilaterally.

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OFFICE OF
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Recommendation 86-3

Agencies' Use of Alternative Means of Dispute Resolution

Adopted June 20, 1986

Federal agencies now decide hundreds of thousands of cases annually—far more than do federal courts. The formality, costs and delays incurred in administrative proceedings have steadily increased, and in some cases now approach those of courts. Many agencies act pursuant to procedures that waste litigants' time and society's resources and whose formality can reduce the chances for consensual resolution. The recent trend toward elaborate procedures has in many cases imposed safeguards whose transaction costs, to agencies and the public in general, can substantially outweigh their benefits.

A comprehensive solution to reducing these burdens is to identify instances where simplification is appropriate. This will require a careful review of individual agency programs and the disputes they involve. A more immediate step is for agencies to adopt alternative means of dispute resolution, typically referred to as "ADR," or to encourage regulated parties to develop their own mechanisms to resolve disputes that would otherwise be handled by agencies themselves. ADR methods have been employed with success in the private sector for many years, and when used in appropriate circumstances, have yielded decisions that are faster, cheaper, more accurate or otherwise more acceptable, and less contentious. These processes include voluntary arbitration, mandatory arbitration, factfinding, minitrials, mediation, facilitating, convening and negotiation. (A brief lexicon defining these terms is included in the Appendix to this recommendation.) The same forces that make ADR methods attractive to private disputants can render them useful in cases which a federal agency decides, or to which the government is a party. For these methods to be effective, however, some aspects of current administrative procedure may require modification.

It is premature to prescribe detailed procedures for a myriad of government activities since the best procedure for a program, or even an individual dispute, must grow out of its own needs. These recommendations therefore seek to promote increased, and thoughtful, use of ADR methods. They are but a first step, and ideally should be supplemented with further empirical research, consultation with experts and interested parties, and more specific Conference proposals.

Recommendation

A. General

1. Administrative agencies, where not inconsistent with statutory authority, should adopt the alternative methods discussed in this recommendation for resolving a broad range of issues. These include many matters that arise as a part of formal or informal adjudication, in

rulemaking,[1] in issuing or revoking permits, and in settling disputes, including litigation brought by or against the government. Until more experience has been developed with respect to their use in the administrative process, the procedures should generally be offered as a voluntary, alternative means to resolve the controversy.

2. Congress and the courts should not inhibit agency uses of the ADR techniques mentioned herein by requiring formality where it is inappropriate.

B. Voluntary Arbitration

3. Congress should act to permit executive branch officials to agree to binding arbitration to resolve controversies. This legislation should authorize any executive official who has authority to settle controversies on behalf of the government to agree to arbitration, either prior to the time a dispute may arise or after a controversy has matured, subject to whatever may be the statutory authority of the Comptroller General to determine whether payment of public funds is warranted by applicable law and available appropriations.

4. Congress should authorize agencies to adopt arbitration procedures to resolve matters that would otherwise be decided by the agency pursuant to the Administrative Procedure Act ("APA") or other formal procedures. These procedures should provide that—

(a) All parties to the dispute must knowingly consent to use the arbitration procedures, either before or after a dispute has arisen.

(b) The parties have some role in the selection of arbitrators, whether by actual selection, by ranking those on a list of qualified arbitrators, or by striking individuals from such a list.

(c) Arbitrators need not be permanent government employees, but may be individuals retained by the parties or the government for the purpose of arbitrating the matter.

(d) Agency review of the arbitral award be pursuant to the standards for vacating awards under the U.S. Arbitration Act, 9 U.S.C. § 10, unless the award does not become an agency order or the agency does not have any right of review.

(e) The award include a brief, informal discussion of its factual and legal basis, but neither formal findings of fact nor conclusions of law.

(f) Any judicial review be pursuant to the limited scope-of-review provisions of the U.S. Arbitration Act, rather than the broader standards of the APA.

(g) The arbitral award be enforced pursuant to the U.S. Arbitration Act, but is without precedential effect for any purpose.

5. Factors bearing on agency use of arbitration are:

(a) Arbitration is likely to be appropriate where—

(1) The benefits that are likely to be gained from such a proceeding outweigh the probable delay or costs required by a full trial-type hearing.

(2) The norms which will be used to resolve the issues raised have already been established by statute, precedent or rule, or the parties explicitly desire the arbitrator to make a decision based on some general standard, such as "justice under the circumstances," without regard to a prevailing norm.

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[1] See ACUS Recommendations 82-4 and 85-5, "Procedures for Negotiating Proposed Regulations," 1 CFR §§ 305.82-4 and 85-5.

(3) Having a decisionmaker with technical expertise would facilitate the resolution of the matter.

(4) The parties desire privacy, and agency records subject to disclosure under the Freedom of Information Act are not involved.

(b) Arbitration is likely to be inappropriate where—

(1) A definitive or authoritative resolution of the matter is required or desired for its precedential value.

(2) Maintaining established norms or policies is of special importance.

(3) The case significantly affects persons who are not parties to the proceeding.

(4) A full public record of the proceeding is important.

(5) The case involves significant decisions as to government policy.

6. Agency officials, and particularly regional or other officials directly responsible for implementing an arbitration or other ADR procedure, should make persistent efforts to increase potential parties' awareness and understanding of these procedures.

C. Mandatory Arbitration

7. Arbitration is not in all instances an adequate substitute for a trial-type hearing pursuant to the APA or for civil litigation. Hence, Congress should consider mandatory arbitration only where the advantages of such a proceeding are clearly outweighed by the need to (a) save the time or transaction costs involved or (b) have a technical expert resolve the issues.

8. Mandatory arbitration is likely to be appropriate only where the matters to be resolved—

(a) Are not intended to have precedential effect other than the resolution of the specific dispute, except that the awards may be published or indexed as informal guidance;

(b) May be resolved through reference to an ascertainable norm such as statute, rule or custom;[2]

(c) Involve disputes between private parties; and

(d) Do not involve the establishment or implementation of major new policies or precedents.

9. Where Congress mandates arbitration as the exclusive means to resolve a dispute, it should provide the same procedures as in Paragraph 4, above.

D. Settlement Techniques

10. In many situations, agencies already have the authority to use techniques to achieve dispute settlements. Agencies should use this authority by routinely taking advantage of opportunities to:

(a) Explicitly provide for the use of mediation.

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[2] For example, the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, provides for mandatory arbitration with respect to the amount of compensation one company must pay another and yet provides no guidance with respect to the criteria to be used to make these decisions. The program has engendered considerable controversy and litigation.

(b) Provide for the use of a settlement judge or other neutral agency official to aid the parties in reaching agreement.[3] These persons might, for instance, advise the parties as to the likely outcome should they fail to reach settlement.

(c) Implement agreements among the parties in interest, provided that some means have been employed to identify other interested persons and afford them an opportunity to participate.

(d) Provide for the use of minitrials.

(e) Develop criteria that will help guide the negotiation of settlements.[4]

11. Agencies should apply the criteria developed in ACUS Recommendations 82-4 and 85-5, pertaining to negotiated rulemaking,[5] in deciding when it may be appropriate to negotiate, mediate or use similar ADR techniques to resolve any contested issue involving an agency. Settlement procedures may not be appropriate for decisions on some matters involving major public policy issues or having an impact on persons who are not parties, unless notice and comment procedures are used.

12. Factors bearing on agency use of minitrials as a settlement technique are:

(a) Minitrials are likely to be appropriate where—

(1) The dispute is at a stage where substantial additional litigation costs, such as for discovery, are anticipated.

(2) The matter is worth an amount sufficient to justify the senior executive time required to complete the process.

(3) The issues involved include highly technical mixed questions of law and fact.

(4) The matter involves materials that the government or other parties believe should not be revealed.

(b) Minitrials are likely to be inappropriate where—

(1) Witness credibility is of critical importance.

(2) The issues may be resolved largely through reference to an ascertainable norm.

(3) Major questions of public policy are involved.

13. Proposed agency settlements are frequently subjected to multiple layers of intra-agency or other review and therefore may subsequently be revised. This uncertainty may discourage other parties from negotiating with federal officials. To encourage settlement negotiations, agencies should provide means by which all appropriate agency decisionmakers are involved in, or regularly apprised of, the course of major negotiations; agencies should also endeavor to streamline intra-agency review of settlements. These efforts should serve to ensure that the concerns of interested segments of the agency are reflected as early as possible in settlement negotiations, and to reduce the likelihood that tentative settlements will be upset.

14. In cases where agencies must balance competing public policy interests, they should adopt techniques to enable officials to assess, in as objective a fashion as possible, the merits

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[3] *See, e.g.*, the procedure used by the Federal Energy Regulatory Commission.

[4] *See* ACUS Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties," 1 CFR § 305.79-3.

[5] *See also*, ACUS Recommendation 84-4, "Negotiated Cleanup of Hazardous Waste Sites Under CERCLA," 1 CFR § 305.84-4.

of a proposed settlement. These efforts might include establishing a small review panel of senior officials or neutral advisors, using a minitrial, publishing the proposed settlement in the Federal Register for comment, securing tentative approval of the settlement by the agency head or other senior official, or employing other means to ensure the integrity of the decision.

15. Some agency lawyers, administrative law judges, and other agency decisionmakers should be trained in arbitration, negotiation, mediation, and similar ADR skills, so they can (a) be alert to take advantage of alternatives or (b) hear and resolve other disputes involving their own or another agency.

E. Private Sector Dispute Mechanisms

16. Agencies should review the areas that they regulate to determine the potential for the establishment and use of dispute resolution mechanisms by private organizations as an alternative to direct agency action. Where such use is appropriate, the agency should—

(a) Specify minimal procedures that will be acceptable to qualify as an approved dispute resolution mechanism.

(b) Oversee the general operation of the process; ordinarily, it should not review individual decisions.

(c) Tailor its requirements to provide an organization with incentives to establish such a program, such as forestalling other regulatory action, while ensuring that other interested parties view the forum as fair and effective.

Appendix

Lexicon of Alternate Means of Dispute Resolution

Arbitration. Arbitration is closely akin to adjudication in that a neutral third party decides the submitted issue after reviewing evidence and hearing argument from the parties. It may be binding on the parties, either through agreement or operation of law, or it may be non-binding in that the decision is only advisory. Arbitration may be voluntary, where the parties agree to resolve the issues by means of arbitration, or it may be mandatory, where the process is the exclusive means provided.

Factfinding. A "factfinding" proceeding entails the appointment of a person or group with technical expertise in the subject matter to evaluate the matter presented and file a report establishing the "facts." The factfinder is not authorized to resolve policy issues. Following the findings, the parties may then negotiate a settlement, hold further proceedings, or conduct more research.

Minitrial. A minitrial is a structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case. A neutral adviser sometimes presides over the proceeding and will render an advisory opinion if asked to do so. Following the presentations, the officials seek to negotiate a settlement.

Mediation. Mediation involves a neutral third party to assist the parties in negotiating an agreement. The mediator has no independent authority and does not render a decision; any decision must be reached by the parties themselves.

Facilitating. Facilitating helps parties reach a decision or a satisfactory resolution of the matter to be addressed. While often used interchangeably with "mediator," a facilitator generally conducts meetings and coordinates discussions, but does not become as involved in the substantive issues as does a mediator.

Convening. Convening is a technique that helps identify issues in controversy and affected interests. The convenor is generally called upon to determine whether direct negotiations among the parties would be a suitable means of resolving the issues, and if so, to bring the parties together for that purpose. Convening has proved valuable in negotiated rulemaking.

Negotiation. Negotiation is simply communication among people or parties in an effort to reach an agreement. It is used so routinely that it is frequently overlooked as a specific means of resolving disputes. In the administrative context, it means procedures and processes for settling matters that would otherwise be resolved by more formal means.

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DISPUTE RESOLUTION AND ADMINISTRATIVE LAW: THE HISTORY, NEEDS, AND FUTURE OF A COMPLEX RELATIONSHIP

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I. INTRODUCTION

THE invitation to this Symposium described the "concern over the backlog in our courts and the high costs to litigants for full-scale trials" and mentioned that alternative means of dispute resolution have become a "timely subject to the legal community."[1] Others have described the potential of alternative means of dispute resolution in similar terms:

> Society cannot and should not rely exclusively on the courts for the resolution of disputes. Other mechanisms may be superior in a variety of controversies. They may be less expensive, faster, less intimidating, more sensitive to disputants' concerns, and more responsive to underlying problems. They may dispense better justice, result in less alienation, produce a feeling that a dispute was actually heard, and fulfill a need to retain control by not handing the dispute over to lawyers, judges, and the intricacies of the legal system.[2]

There is no question but that a great deal of attention is currently being paid to dispute resolution — finding ways of resolving our differences outside of (or perhaps along side of) the courts — both as a way of providing relief to the courts and as a way of reaching more satisfactory decisions.

Interestingly, it also seems customary to describe the purpose of many administrative programs and the accompanying process as providing a more responsive, flexible means by which society's decisions can be made.[3] Trials before agencies were supposed to be less cumbersome, less expensive, and less time consuming than courtroom hearings.[4] Rulemaking was seen as a way of filling in the details of legislation or responding to particular needs in an easy, quickly executed manner as opposed to the vagaries of legislation or using trials to develop policy through the common law. Throughout this process, the courts were to ensure that the action taken was not arbitrary or capricious, and certainly within the bounds of legality, but other than that they were to accommodate the agencies' decisions.[5]

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[1] Letter from J. Gordon Cooney, Jr., Editor-in-Chief, Villanova Law Review to Philip J. Harter (Aug. 10, 1983) (invitation to participate in 1984 Law Review Symposium).

[2] OFFICE OF LEGAL POLICY OF THE UNITED STATES DEPARTMENT OF JUSTICE, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION (1984).

[3] *See* B. SCHWARTZ, ADMINISTRATIVE LAW 3 (1976). Thus, for example, ad-

It seems equally clear that the administrative process has now become part of the problem. Programs founded to be responsive have become laborious, unyielding, and repressive. The process itself is "increasingly being criticized for being unduly costly, cumbersome and slow."[6] These problems arose no doubt in part through bureaucratic momentum and an effort to protect past values. But, they also arose from quite appropriate responses to very real difficulties.

It therefore seems incumbent on those of us who are interested in the administrative process and in improving the way we make decisions affecting each other to be vigilant to see if there are ways of

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ministrative agencies were to address and redress problems created by or beyond the reach of the courts. One commentator explained that the definition of an "agency" in the Administrative Procedure Act (APA) "equates the agency with the executive branch." *Id.*; *see* Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1982). The APA defines an "agency" as:

> [E]ach authority of the Government of the United States whether or not it is within or subject to review by another agency, but does not include—
>
> (A) the Congress;
>
> (B) the courts of the United States;
>
> (C) the governments of the territories or possessions of the United States;
>
> (D) the government of the District of Columbia.

5 U.S.C. § 551(1)(A)-(D) (1982).

[4] *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT 194-214 (3d ed. 1972) (describing the adjudication procedures used by agencies) [hereinafter cited as DAVIS TEXT]; B. SCHWARTZ, *supra* note 3, at 263-327 (discussing the fair hearing requirements which are applied to agencies). In addition to being less expensive and less time consuming, the rules of procedure and evidence were to be tailored to achieve justice and economy. *See generally* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 102, at 308-09 (1979) (discussing "fair informal procedure" as a more accurate description for agency action currently referred to as "adjudication")[hereinafter cited as DAVIS TREATISE].

[5] *See* Administrative Procedures Act, 5 U.S.C. § 706(2)(A) (1982). The APA directs the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*; *see generally* 1 DAVIS TREATISE, *supra* note 4, at § 6:6 (discussing judicial review of agency rules and the effect of that review on the agency's choice of a rulemaking procedure).

[6] Announcement of ABA Section of Administrative Law, Consensus as an Alternative to the Adversarial Process (program held September 30, 1983).

aligning the difficult balance of providing appropriate safeguards while reestablishing the original promise of administrative law.[7]

The review of the administrative process may be particularly pertinent to a general discussion of dispute resolution because it arose to meet a need in dispute resolution. In addition, as its processes evolved and matured, it had to struggle — and is struggling — to define its relationship to the courts. Thus, the "institutionalization"[8] of dispute resolution may learn much from the administrative process, and in turn the administrative process can profitably draw on the insights we are gaining on various forms of dispute resolution.

To put the complex relationship of dispute resolution and the administrative process into perspective, it is helpful to look at its history, the current needs, and the future.

II. HISTORY OF ADMINISTRATIVE LAW

A. *Establishment of Programs*

Many administrative agencies, the programs they administer, and individual regulations they issue can be explained, at least somewhat, by a dissatisfaction with existing mechanisms for resolving either rights or interest disputes.[9] The response has been the creation of agencies that are designed to alter the substantive rights of the affected parties and supplant judicial processes with an administrative one that, it is hoped, will better fulfill the goals of the program. Consider five examples:

1. National Labor Relations Act (Act).[10] Traditional legal concepts and doctrines, such as criminal prosecutions alleging conspiracy or application of antitrust laws to union organizing, which were applied by the courts to labor relations led to broad dissatisfaction with the resulting antiunion or antiself-help holdings.[11] The result was the passage of the National Labor Relations Act that is administered by the National Labor Relations Board (Board). The

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[7] For discussion of the appropriate balance between safeguards and responsiveness, see notes 31-32 and accompanying text *infra*.

[8] That seems an unfortunate term for the long run establishment of dispute resolution programs. While "establishment" has an aura of success about it, institutionalization sounds like a commitment to the local mental hospital. Nonetheless, that appears to be accepted terminology.

[9] Perritt, *"And the Whole Earth Was of One Language"—A Broad View of Dispute Resolution*, 29 VILL. L. REV. 1221 (1984).

[10] 29 U.S.C. §§ 151-168 (1982).

[11] Much of the following analysis applies to regulatory programs that are designed to address "social" concerns that arise from an inequality of bargaining power.

Act itself gave rise to substantive rights of organization that were previously denied, and the Board was to be an expert body that would be sympathetic to the cause of the rights of employees to organize and bargain collectively.[12] Moreover, a piece of the prolabor legislation[13] barred courts from interfering with this policy by issuing injunctions based on the traditional doctrines.[14] Thus, there was substantive dissatisfaction with the state of the law as administered by the courts, so it was changed. There was also dissatisfaction with the bias that judges were reflecting and so a new, more sympathetic forum was created to hear the disputes that arose.

2. Environmental Protection Agency (EPA). On first blush, the failure of dispute resolution would seem to have little to do with the Clean Air Act,[15] the Federal Water Pollution Control Act[16] or any of the other statutes that EPA administers.[17] If those who live

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[12] *See* 29 U.S.C. § 151 (1982). The Act was passed to protect "by law the right of employees to organize and bargain collectively," and as a result safeguard "commerce from injury, impairment, or interruption." *Id.*

[13] The Norris-LaGuardia Act "declared it to be the public policy of the United States that employees be permitted to organize and bargain collectively free of employer coercion and sought to achieve that goal by regulating and in most cases barring altogether the issuance of injunctions in a 'labor dispute.' " R. Gorman, Basic Text on Labor Law 4 (1976); *see* 29 U.S.C. §§ 101-110, 113-115 (1982).

[14] R. Gorman, *supra* note 13, at 4; *see generally* A. Cox, D. Bok & R. Gorman, Cases and Materials on Labor Law 55-60 (9th ed. 1981) (a general discussion of some of the traditional doctrines upon which injunctions were based prior to the Norris-LaGuardia Act).

[15] 42 U.S.C. §§ 7401-7642 (1982). The Clean Air Act "regulates industrial air pollution by two distinct methods: air quality control and emission control." R. Zener, Guide to Federal Environmental Law 1 (1981).

[16] 33 U.S.C. §§ 1251-1376 (1982); *see generally* R. Zener, *supra* note 15, at 59-124 (an in-depth discussion of water pollution control legislation).

[17] The analysis that follows applies generally to regulatory programs that address "externalities." *See* S. Breyer, Regulation and Its Reform 23-26 (1982); I. Millstein & S. Katsh, The Limits of Corporate Power 138-42 (1981). It also applied to those regulatory areas known as "preclearance," although not as well. *See generally* I. Millstein & S. Katsh, *supra*, at 142-43 (preclearance regulation requires agency approval before product is marketed). It would apply, for example, to the safety and efficacy of pharmaceuticals, since an expeditious means of resolving disagreements would internalize costs of mistakes and other problems. For that argument to work, one must assume the firm will anticipate the adverse consequences that would flow from marketing a dangerous drug and hence would conduct the optimal amount of testing to ensure its reasonable safety (and anticipating the need to get it on the market to meet a legitimate need). Not surprisingly, some people are repulsed by the notion that some individuals would pay with their lives to provide the information on hazards, and hence they argue in favor of a regulatory system that anticipates risks and seeks to prevent unreasonable risks before the drug is marketed. Even in that case, the dispute resolution theory might apply to the efficacy of drugs which are now regulated by the Food and Drug Administration. There is an extensive debate over whether the anticipatory regulation may actually lead to more deaths and serious illness than would the dispute resolution model. *See, e.g.*, Roberts & Bodenheimer, *The Drug Amendments of 1962: The Anatomy of a Regulatory Failure*, 1982

around a plant that is polluting the air or water had a responsive, inexpensive means of enforcing a "right"[18] to clean air or water and recovering damages from the offending plant, the costs of the pollution would be internalized and the company would be forced to make an economic choice between paying and polluting or cleaning up. That choice would be enforced better than the EPA is likely able to do because those affected would presumably have a greater incentive — and appropriate knowledge — to bring an action. Moreover, the choice would likely be more nearly economically optimal since the costs would be distributed more precisely than is possible in command-and-control regulation.[19] Thus, under this system there would be no externalities to necessitate or justify regulation. But, of course, such a system does not exist: there is no direct, inexpensive, accurate system for internalizing those costs. Doing so would be wildly expensive and time consuming so that, as a result, the costs of pollution are borne by the neighbors. As a result of what has been perceived as a misallocation, the regulatory program was created that prohibits certain conduct altogether as a means of internalizing the costs. Moreover, a central agency is called upon to enforce its proscriptions. Sometimes that is because the beneficiaries — the neighbors in this case — still could not afford to enforce their new rights; and in other cases they could afford to do so, in which case the regulated company urges the limitation as a way of raising barriers to dispute resolution and hence warding off payments (be they accurate or not).[20]

3. Federal Trade Commission (FTC). Several of the FTC's rules appear to be based, in fact if not as the stated purpose, squarely

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ARIZ. ST. L.J. 581, 612-13 (recommending informal dispute resolution to expedite new drug approval process).

[18] That "right" could be created by statute and administered by the elusive dispute resolution mechanism, or it could evolve from a "common law" response. There are several ways of altering the resolution of competing interests. The point here is the need for a functioning mechanism to resolve the disputes that would arise once the interests were identified.

[19] Command-and-control is a type of regulation in which the agency "require[s] or proscribe[s] specific conduct by regulated firms." Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256, 1264 (1981). The regulating body enforces the commands with controls such as "orders, injunctions, civil penalties, and criminal fines." *Id.*

[20] Note that disputes over whether the Clean Air Act and its implementing regulations have been violated are resolved by a court, not before the agency itself. *See* 42 U.S.C. § 7413 (1982). Given that it has become commonplace to have agencies themselves conduct hearings on whether the duties they impose have been met, this may well have reflected a concern on the part of business that the agency itself would be biased in favor of finding a violation and that it could receive a fairer, more impartial hearing before a court. That is certainly the history of the separation of the Occupational Safety and Health Review Commission from the Occupational Safety Health Administration, which issues the standards and citations for their violation.

on the Commission's belief that existing dispute resolution mechanisms are inadequate to redress what it perceived to be a problem. For example, if it were not so expensive and difficult to prosecute common law or statutory fraud cases, the Commission's regulation of vocational schools[21] would make little sense. In order to prevent this pattern of fraud more effectively, the Commission prescribed specific rules the schools must meet.[22] The violation of these rules was then a violation of a duty owed to the FTC; and the Commission would enforce the rule against the errant school. Thus, as a result of the failure of a ready means for seeking redress, specific duties were created and the aggrieved party was changed from the individual to the Commission. Interestingly, the student was left in about the same position as before: without recourse other than complaining to the Commission which might or might not take action.[23] The FTC's rules on franchises[24] are similar.

4. Workers Compensation.[25] Worker compensation programs were in fact established because of dissatisfaction with the tort system for compensating injured employees. The programs created new rights that overrode the existing substantive law and were to be administered by an agency. Disagreements are resolved not in courts — at least in the first instance — but before the agencies themselves. The process was likely envisioned as a mix of bureaucratic justice, in which expert desk officers make the initial decisions, and a more judicial-like, but nonetheless sympathetic, forum resolves remaining disputes.[26] Only after that were courts invoked. Again, the lack of a

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[21] The FTC established regulations with which proprietary vocational and home study schools had to comply to avoid committing unfair and deceptive acts. *See* 16 C.F.R. § 438 (1984). The purpose of this rule was "to alleviate currently abusive practices" such as "unfair and deceptive advertising sales, and enrollment practices engaged in by some of the schools." Katharine Gibbs School, Inc. v. FTC, 612 F.2d 658, 661 (2d Cir. 1979) (quoting 43 Fed. Reg. 60,795-817 (1978)).

The FTC's rule was held invalid in 1979 because the regulation treated violations of the FTC's " 'requirements prescribed for the purpose of preventing' unfair practices as themselves the unfair practices." *Id.* at 662.

[22] *See* 16 C.F.R. § 438 (1984).

[23] The existence of the rule might, of course, alter the student's bargaining power in informal negotiations with the school. The student is not, however, provided the right to enforce the duty created by the rule in any forum that can issue a binding order. The rule required that the school include specific rights in its contract with students, and those rights would presumably be enforceable by the student through civil litigation; if the required clauses were omitted, however, it would appear that enforcement would remain solely with the FTC. *See id.*

[24] *See* 16 C.F.R. § 436 (1984).

[25] A similar analysis would apply to Social Security Disability, Black Lung, or Railroad Retirement programs.

[26] For a thorough discussion of the mix of bureaucratic and judicial justice in Social Security disability cases, see J. MASHAW, BUREAUCRATIC JUSTICE (1983).

sympathetic, responsive forum led to the creation of an administrative program.

5. Toxic Torts.[27] The enormous amount of litigation, both before courts and in workers compensation programs, over occupational exposure to asbestos and the current concern over illness resulting from exposure to toxic materials[28] has led to proposals for the creation of new agencies, or the adaption of existing ones, to deal with the problem.[29] Some commentators have suggested that an agency could process disputes over whether a particular illness is sufficiently linked to a substance as to impose liability on its manufacturer.[30] Other authorities have suggested that an agency could develop information and presumptions that would be used in processing future claims and disputes.

In sum, many regulatory programs are created to rectify a perceived market imperfection[31] that may in fact reflect an inability to resolve substantive disputes appropriately. That is, some people are regarded as "victims" because they lack the redress that would be necessary for their rights and duties to be properly aligned with the rights and duties of others. The response, then, is the creation of an administrative program that both alters the substantive relationships and provides a built-in dispute resolution mechanism under more sympathetic procedures.[32]

The lesson in all of this is simply that dispute resolution and regulation are closely related. We therefore need to consider both how to improve dispute resolution and whether a regulatory program is needed to cure some perceived social ill. Lack of sensitivity to that link may result in dysfunctional overkill that will actually hurt in the long run. Moreover, one needs to be sensitive to the history of administrative programs when looking at the institutionalization of new forms of dispute resolution: perhaps the appropriate response is not a new form of dispute resolution but the creation of an agency; or, contrariwise, perhaps in some cases the experience will indicate the nature of future problems that are likely to arise.

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[27] For a review of the problems in the area of toxic torts, see *Seventeenth Annual Symposium, Toxic Torts: Judicial and Legislative Responses*, 28 VILL. L. REV. 1083 (1983); Comment, 28 VILL. L. REV. 1298 (1983).

[28] *See* Schwartz & Means, *The Need for Federal Product Liability and Toxic Tort Legislation: A Current Assessment*, 28 VILL. L. REV. 1088 (1983).

[29] *See id.* at 1109-15.

[30] This rather awkward way of saying (or, rather, avoiding saying) causation, is in recognition of the difficulty in establishing "causation" in any rigorous sense under traditional tort law. The diseases may become manifest decades after exposure, have multiple etiologies, and also have a significant background incidence. Thus, ascribing a particular disease to a particular event (even one continuing over a period of time) may be impossible under the best of circumstances, and even more so given the frequent lack of data. As a result, a new form of resolving the question of illnesses that are attributed to exposure to toxic materials has been advocated. Some commentators have also been opposed on the ground that the uncertainty would be inappropriately resolved in favor of excessive recovery. The debate will likely be one of the lively political debates of the year. *See* Kircher, *Federal Product Legislation and Toxic Torts: The Defense Perspective*, 28 VILL. L. REV. 1116, 1119-31 (1983).

[31] This theory may not apply to regulatory programs that are designed to cure failure of competition. *See* I. MILLSTEIN & S. KATSH, *supra* note 17, at 132-46.

[32] Some programs are, of course, enforced in courts, or by other existing means. The dispute resolution mechanism is nonetheless altered by changing the nature of the underlying dispute.

B. *Administrative Procedure*

While new administrative programs were being created during the 1920's and 1930's to provide new rights, greater flexibility, and more responsiveness to new situations, efforts were simultaneously being made to use the procedure by which they operated to confine the exercise of the new powers to that explicitly granted by Congress.[33] Moreover, many of the programs that were developed during this period required quite formal proceedings for developing rules and operated through formal processes.[34] Congress passed a bill in 1939[35] that would codify this approach generally, only to have it vetoed by President Roosevelt because it was too rigid. In language reminiscent of that describing the need for alternative means of dispute resolution and the problems with both courts and lawyers, President Roosevelt pointed out his problems with the bill:

> The administrative tribunal or agency has been evolved in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and nontechnical hearings take the place of court trials and informal proceedings supersede rigid and formal pleadings and processes . . . .
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> . . . [A] large part of the legal profession[, however,] has never reconciled itself to the existence of the administrative tribunal. Many of them prefer the stately ritual of the

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[33] Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1671-73 (1975). Professor Stewart has explained the confines placed upon administrative law as follows: "Coercive controls on private conduct must be authorized by the legislature, and, under the doctrine against delegation of legislative power, the legislature must promulgate rules, standards, goals, or some 'intelligible principle' to guide the exercise of administrative power." *Id.* at 1672 (footnote omitted).

[34] ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 105-08 (1941).

[35] Walter-Logan Bill, H.R. 6324, 76th Cong., 3d Sess. (1940).

> courts, in which lawyers play the speaking parts, to the simple procedure of administrative hearings which a client can understand and even participate in.[36]

Thus, there has been a tension in administrative procedure between those who desire a relatively formal process and those who desire a more flexible process. While the Administrative Procedure Act (APA) codified some types of procedures, the battle over the administrative process continues.[37]

The APA, unlike Gaul, is divided into two relatively distinct camps: notice and comment rulemaking and hearings of some sort, with an emphasis on formal, trial-type activities.[38] The rulemaking section calls only for a notice of proposed rulemaking in the *Federal Register*, the receipt of comments from interested members of the public, the consideration of "relevant" matters presented, and finally a notice of the final rule along with a "concise general statement of [its] basis and purpose." In fact, however, a far more comprehensive procedure was contemplated for rules of much substance.[39] On the other hand, intricate and complex procedures are spelled out for adjudication and formal rulemaking.[40]

But in fact these two models are only the poles of a continuum of procedures.[41] There is more, and it is complicated. The two models do not recognize[42] some of the important variations of the administrative process that have arisen in the past twenty years during the enormous growth of the administrative state.

For example, is a permit issued by the EPA under any of the several statutes it administers a rule or an adjudication?[43] What about the restrictions in the Chrysler loan guarantee or other subsidies? What about all those conditions put in grants to states—such as the 55 m.p.h. speed limit—that are every bit as coercive as a regulation but outside the confines of the APA? How are agencies supposed to make decisions such as whether to put roads in national forests, to approve an environmental impact statement, or to approve a request for a rent increase in subsidized housing? And, indeed, what of adjudication itself? The provisions of the APA are genuinely Byzantine. But they apply only to the formal hearings presided over by administrative law judges. Other forms of hearings are not described. Moreover, the Departments of Labor and Health and Human Services alone employ more than 800 administrative law judges and process 400,000 cases each year.[44] The procedures which agencies actually follow are far more diverse than those defined in the APA. They arise through ad hoc judgments, are provided for in substantive statutes, and are imposed by courts. Agencies have created a broad range of alternative means of making the incredibly varied decisions the government is called on to make. It might help if we explicitly recognized these alternatives. Perhaps the APA could be expanded to take account of what is really happening, thereby consolidating our experience so that others could build on it.

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[36] 86 CONG. REC. 13,942-43 (1940).

[37] Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 2-18 (1982).

[38] For example, the APA first defines a "rule." 5 U.S.C. § 551(4) (1982). An "order" is then defined as "the whole or part of a final disposition . . . of an agency in a matter other than rule making but including licensing." *Id.* § 551(6). "Adjudication" is in turn defined as the "process for the formulation of an order." *Id.* § 551(7). Thus, the world is divided into two parts: rules and orders, and the correlative procedure is either rulemaking or adjudication.

[39] Harter, *supra* note 37, at 9-10.

[40] 5 U.S.C. §§ 557-558 (1982).

[41] Since rulemaking has *some* structure, it is not actually the lower bound since some administriative actions are without any structure whatever. It is, however, likely to be the pole with respect to any defined process since it is so flexible and has many exceptions.

[42] Along with the APA, administrative law texts tend to follow the rigid dichotomy and overlook the other processes.

[43] While reading the definition of a rule (a statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law) might reasonably lead one to believe that a permit is a rule (it is, of course, of particular applicability; it will take effect in the future; and it implements law) that is not

We need also to build on the experience of others. We are gaining insights into new forms of dispute resolution or, more accurately, the application of dispute resolution techniques in new settings. A literature is developing — this Symposium is part of it — on the subject, often along substantive lines. We need to take advantage of this trend and marry that experience and understanding with the peculiar needs of the administrative process.

These alternative techniques have been used in the administrative process, and much more appears to be developing currently. But no particular theory has developed as to how they should be used, how they relate to the traditional processes, what forms of procedures should be used to ensure that appropriate protections are afforded the parties and the body politic, and what their advantages and disadvantages are in particular settings. Research on that front is in progress and our understanding will undoubtedly grow as our experience does.

In the meantime, four areas of administrative procedure seem

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the answer. *See* note 38 *supra.* The adjudicatory sections of the APA are not terribly responsive to the needs here, however.

[44] *See generally* Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 AD. L. REV. 109 (1981).

particularly in need of various means of dispute resolution that have not been generally used in the administrative process, or at least are not recognized as having been generally used.

III. NEEDS OF ADMINISTRATIVE PROCEDURE

Administrative law has been, as the saying goes with respect to the states, a "laboratory" where many alternative procedures have been created and experimented with, sometimes discarded and sometimes institutionalized.[45] But it has lagged behind the private sector in its use and adaptation of the various forms of dispute resolution that are being discussed at this Symposium. Happily, a number of agencies are responding to the challenge and a considerable amount of effort is going into looking at new ways of doing things.

We are on the verge of a new round of experimentation with administrative procedure.[46] While the use and adaptation of these dispute resolution mechanisms is needed across virtually the entire span of administrative law, it seems convenient to break down the analysis into four categories: rulemaking; agency adjudication; forms of administrative decisions not specifically mentioned in the APA; and dispute resolution mechanisms in the private sector that are used in lieu of agency action or are required by agency action.

A. *Rulemaking*

The rulemaking provisions of the APA are remarkably sparse — consult, draft, consult, publish. They were borne of a compromise between those who favored very little restriction on an agency and those who wanted everything done in trials.[47] While an agency's duties are few, the drafters clearly contemplated that more would be done when necessary.[48] There would be two reasons for faith in the resulting regulations: One theory had it that the agencies were "experts" and, in a technocratic way, could figure out how best to respond to the situation at hand.[49] The second reason was that agencies would operate comfortably within the confines of a political consensus, so their actions could be judged directly against the prevailing norms.[50] Both theories broke down, however, as we moved into the regulatory state. New regulations require enormous factual material and as a result the expert model does not work terribly well: indeed it has been repudiated in fact if not explicitly, although vestiges clearly remain.[51] Few agencies enjoy a consensus as to their mission, and there is a strong feeling by many that the agency has an independent agenda, although both sides tend to think it favors the other. Thus, that too has waned as a justification for agency action.

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[45] *See, e.g.*, Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1133-34 (D.C. Cir. 1983) (Wilkie, J., dissenting) (judicially created consent decree requiring creation of new EPA programs should not be enforced because it limits the flexibility of the EPA Administrator in making choices as to priorities, methods, and allocation of resources), *cert. denied*, 104 S. Ct. 2668 (1984).

[46] It is interesting to note that in general over the past twenty-five years, American administrative law has become increasingly judicialized. Both its rulemaking and adjudicatory procedures have become formal and more courtroom-like. European procedure, on the other hand, was more informal, contained more direct negotiations among the major parties in interest but with little ability on the part of others to sway the decisions, and hence relied more on the general political environment to ensure decisions consistent with the public will. Recently, however, we have seen a leavening of the American approach, with an increasing reliance on oversight, internal controls, and direct participation through informal means, while in Europe the procedures are becoming increasingly structured. Thus, the two are converging.

[47] *See generally* DAVIS TEXT, *supra* note 4, at 9 (the 1946 enactment of the APA was the result of a compromise between the plans proposed by the Administration and the American Bar Association).

The "hybrid rulemaking process" evolved to provide the missing legitimacy. Although its details vary almost from proceeding to proceeding, its basic contours are that all interested parties have a right to present facts and arguments to an agency under procedures designed to test the underlying data and ensure the rationality of the agency's decision;[52] a court of appeals will then take a "hard look" at the agency's action to ensure that the requirements have been met. As a result, the focus is on narrowing the agency's discretion by controlling the record, and hence the fight over the record becomes particularly bitter and adversarial.

But while the factual basis of a rule is unquestionably important, there generally is no purely rational answer or response to it. Rather, at bottom the resulting rule is a political choice that reconciles a host of competing values or interests. Usually the way to legitimize such a political choice is through a legislative process in which representatives of those affected would meet to reach an appropriate resolution.[53] Thus, it appears appropriate to look for a process that is modeled more on the legislature than on the judiciary: regulations developed by those substantially affected would have a political legitimacy beyond that of the hybrid rulemaking process. The Administrative Conference of the United States has recommended that agencies experiment with negotiating regulations directly among the interests that would be substantially affected.[54] The conditions that are hospitable for using direct negotiations are:

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[48] The Supreme Court has made clear that the choice as to whether to invoke the additional procedures belongs to the agency, not a court or any private party. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524 (1978).

[49] *See* Stewart, *supra* note 19, at 1274.

[50] *Id.* Perhaps the prime example of this was the Securities and Exchange Commission (SEC). While there may have been differences of opinion at the fringes, there appeared to be general consensus on its mission, both as to what conduct in the private sector was and was not acceptable and how the agency was to go about policing unacceptable conduct. The SEC was, during that time, widely credited with being the "best" agency. Now that the Commission has ventured into new and controversial areas such as corporate governance, that consensus has broken down and attacks are common.

[51] For a discussion of the breakdown of the "agency as expert" model of administrative law, see Comment, *An Alternative to the Traditional Rulemaking Process: A Case Study of Negotiation in the Development of Regulations*, 29 VILL. L. REV. 1505 (1984).

[52] While anyone can, of course, submit comments in response to a notice of proposed rulemaking, only interested parties can participate in this process fully by invoking the aid of courts or forcing participation in agency hearings.

1. There are a limited number of interests that will be significantly affected, and they are such that individuals can be selected to represent them; a rule of thumb is that fifteen is a practical limit on the number of people who participate at any one time;[55]
2. The issues are ripe and mature for decision;[56]
3. The resolution of the issues presented will not require any interest to compromise a fundamental tenet or value, since agreement on that is unlikely;[57]
4. There is a reasonable deadline for the action so that unless the

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[53] The historical method of legitimizing a political choice was through the legislative process. The Founding Fathers of the United States created a "representive democracy" as a mechanism to reconcile the competing political values and to legitimize the choice which the legislature would make between those values. *See generally* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 58-59 (1969) (direct election of the representatives of the people rendered America's government a form of representation ingrafted upon democracy).

[54] Administrative Conference of the United States Recommendation No. 82-4, 1 C.F.R. § 305.82-4 (1984). The following discussion of negotiating rules is a synthesis of the discussion in the report upon which the Administrative Conference of the United States based its recommendation. *See* Harter, *supra* note 37; *see generally* Comment, *supra* note 51, at 1513-35 (discussing Mr. Harter's proposal for negotiating rules and summarizing a comparative case study of rules of regulations which involved extensive public participation without using Mr. Harter's negotiation format).

[55] Harter, *supra* note 37, at 46. *But see* Comment, *supra* note 51, at 1535-36 & n. 118 (a 15-person limit is too inflexible; the focus should be on representation of all important interests at negotiations).

[56] Harter, *supra* note 37, at 47. An issue may not be ready for resolution because of lack of information, because the interests involved in its resolution are unascertainable, or because the parties involved are still "jockeying for position." *Id.*

[57] *Id.* at 49-50. No party is likely to compromise something it regards as fundamental or an article of faith. Thus, for example, it is not likely that one could have reached agreement on the role of costs in an Occupational Safety and Health Administration health regulation since industry and labor had fundamentally different views on the matter and it was central to how future standards would be developed. Now that the Supreme Court has wrestled with the issue and, even if not resolving it, has put boundaries on the matter, standards may be able to be negotiated. *Id.* (citing Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 639 (1980)).

parties reach an agreement, someone else will impose the decision;[58]
5. There are sufficiently many and diverse issues that the parties can rank them according to their own needs and priorities;[59]
6. There is sufficient countervailing power so that no party is in a position to dictate the result;[60]
7. Participants view it as in their interest to use the process as opposed to the traditional one;[61] and
8. The agency is willing to use the process and will appoint a senior staff member to represent it.[62]

The process envisions that a neutral third party would contact the various parties to review the issues posed by the proposed regulation and determine whether there are additional parties that should be represented in discussions. If the conditions are met, the agency would publish a notice in the *Federal Register* announcing its intention to develop the proposed rule in this way and inviting parties who are not represented to come forward. It would then empanel the group as an advisory committee.[63] Its charge would be to develop a consensus on a proposed rule and supporting preamble. "Consensus" in this context means that no *interest* that is represented dissents from the recommendation.[64] This is necessary so that no interest loses power it might otherwise have through the traditional process. Note also that an individual might object, but overall the interest as a whole does not.[65] It may be, of course, that the group is not able to reach agreement on a particular recommendation, but the discussions reveal a "region" or area within which the parties can "live with the result." In that case, the recommendation would be that agency arbitrate among the interests by developing the rule within those boundaries.

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[58] *Id.* at 47-48. Some party is likely to profit from delay, and because no interest is likely to be willing to invest the time and energy in discussions until it is necessary, a reasonable deadline for action is very helpful. The parties will then know that delay will be greeted with a loss of control or some unacceptable cost. *Id.*

[59] *Id.* at 50. What may be very important to one party may not be that important to others. One of the major benefits of the discussions is that the parties can address the issues directly and attempt to maximize the overall return — against the backdrop of the statute, which defines the national interest, and precedent — by adjusting the reponse to the various issues. A single, bipolar choice is not the stuff of negotiations. *Id.*

[60] *Id.* at 45. One of the major incentives for direct discussions is that parties are otherwise at loggerheads and cannot move without incurring an unacceptable cost. Some parties may gain the power to inflict that cost solely through traditional procedures. In that case, the situation must be carefully reviewed to see if the *threat* of invoking that process is sufficient to empower the party to negotiate, or whether using the alternative process would disenfranchise them. In short, without countervailing power at the table, the process could be badly abused. *Id.*

[61] *Id.* at 43. If parties do not view the process as in their overall interest, it is not likely that discussions will be productive. Thus, it may be inappropriate to say simply that the rule will be developed this way and if anyone wants to participate they must do so in this way. On the other hand, if a process is started, parties frequently will come and participate fully even if they would have advocated it at the outset. *Id.*

[62] *Id.* at 51. *But see* Comment, *supra* note 51, at 1536-37 (agency should be represented by middle-level employees in addition to senior staff members). An agency that is not in favor of this process can always find creative ways to sabotage it. Moreover, experience shows rather vividly that if the agency itself does not participate or have some other intimate connection to it, the fruits of the discussions are highly likely to be rejected or atrophy for lack of attention through the "not invented here" syndrome. Harter, *supra* note 37, at 51.

[63] An advisory committee would have to be empanelled in order to comply with the Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-15 (1982). An advisory committee exists whenever a committee, conference, panel, or similar group is convened in order to render advice to the President or an agency. H.R. REP. NO. 1017,

The agency would agree to use the results as the basis of its proposed rule unless something were quite wrong with them. That is appropriate because a senior agency official presumably concurred in the result, and he should have received the appropriate internal clearances before doing so. Thus, the agreement is not alien to the agency. The group is likely to want such assurance before it will be willing to incur the time, expense, and anguish of reaching an agreement, lest its work simply be disregarded.[66] The agency might wish to append its own comments on the proposal to flesh out public response, but it should clearly delineate between that which is its and that which reflected the consensus of the group. The agency would then subject the proposal to the normal rulemaking process and would, of course, modify the proposal in response to meritorious comments.[67]

Several agencies have started using the process. The Department of Transportation recently announced that it planned to use it to revise its rule concerning pilots' flight duty status time.[68] The rule had proved particularly intractable, and the Federal Aviation Administration had tried several times to revise it, only to be blocked by one interest or another. The existing rule had generated more requests for interpretations than any other, with the result being that the rule was supplemented by over 1,000 pages of agency comments. Nineteen parties[69] started the process on June 29, 1983[70] and held

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92d Cong., 2d Sess. 2-4, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3491, 3492-94.

[64] *See* Harter, *supra* note 37, at 92-97.

[65] *Id.*

[66] *Id.* at 99-102; Harter, *The Political Legitimacy and Judicial Review of Consensual Rules,* 32 AM. U.L. REV. 471, 480 (1983).

[67] Harter, *supra* note 37, at 100-02.

[68] Notice of Intent to Form Advisory Committee for Regulatory Negotiation, 48 Fed. Reg. 21,339 (1983).

[69] Notice of Establishment of Advisory Committee, 48 Fed. Reg. 29,771, 29,772 (1983). The original advisory committee was made up of representatives from the FAA, National Air Carrier Association, National Air Transportation Association,

seven meetings[71] over an eight month period.

The group was not able to reach a consensus on a single proposal, but it did hold thorough and productive sessions. Based on those discussions, the FAA drafted a proposal that was reviewed by the group, which concurred that it should be published as a notice of proposed rulemaking. At this time, it is too early to tell whether the discussions will lead to a rule which is acceptable to the parties that participated in the discussions, as well as any who did not participate.[72]

The Occupational Safety and Health Administration (OSHA) undertook a "feasibility analysis" to determine whether it would be appropriate to use the process for the development of its standard on the occupational exposure to benzene.[73] Following discussions with the interested parties, it appeared that the above conditions were met particularly well. The only possible difficulty was that a great deal of emotional commitment was attached to the standard because of the regulation's history and, since OSHA had announced that it wanted a draft standard within only a few months, there was likely not enough time to use the process. But, since the criteria appeared to be met and it appeared that the parties did in fact have a great deal to discuss, a preliminary meeting was held to determine if it would be fruitful to hold further, informal discussions to the end of developing a consensus on the contours of a standard. The group decided that such meetings would be fruitful, and several informal discussions were held.[74] The meetings thoroughly explored the parties' needs and concerns and alternative ways of meeting them. The parties came very

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Air Line Pilots Association, Flight Engineers International Association, Alaska Air Carriers Association, Aviation Consumer Action Project, Air Transport Association, Regional Airline Association, Helicopter Association International, Pan American World Airways, People's Express, New York Air, Southwest Airlines, DHL Cargo, and International Brotherhood of Teamsters. *Id.*

[70] *Id.*

[71] The advisory committee met seven times between June 29, 1983 and February 14, 1984, for a total of seventeen days. Notice of Proposed Rulemaking, 49 Fed. Reg. 12,136, 12,137-38 (1984).

[72] *See id.* (publication of proposed regulation); *Advisory Committee Supports FAA Draft for Pilot Time Rules*, AVIATION WEEK SPACE TECH., March 12, 1984, at 194.

[73] *See generally* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980) (rule promulgated by OSHA to replace national consensus standard for occupational exposure to benzene held invalid). The *API* case opened the door for negotiation of a new benzene regulation. *See id.*

[74] *Failure of Mediation Group to Agree Will Not Delay Rulemaking, OSHA Says*, 7 CHEMICAL REG. REP. (BNA) 1696 (1984). OSHA did not participate in the discussions, but expressed its support for them and its interest in using their fruits. OSHA continued to develop its own proposal in-house, and hence would have been in a position to judge rather immediately the merits of any proposal that might have emerged. *Id.*

close to a consensus[75] but enough issues separated them that discussions have been adjourned.[76] It seems clear that the group got farther than virtually anyone thought they would over so controversial a regulation, and there was consensus that it had been a productive, rewarding experience. As with the FAA rule, only time will tell whether the discussions have a direct and wholesome effect on the development of a standard.[77]

Although thus far there are no clear success stories that have gone all the way to a consensus on a proposed rule and supporting preamble, it appears that regulatory negotiation offers significant advantages. It enables the parties to address the issues directly and to explore them in a detail that is impossible in the hybrid process. That its first two uses addressed enormously controversial and complex issues also attests to its ability to breach previously unresolvable differences between the parties. As will be discussed below, these two experiences will likely pave the way for future uses, precisely because future parties can be more comfortable with using a "known" process and not worry about the vagaries of the unknown.[78]

B. *Adjudication*[79]

The APA defines the adjudication procedure only for those adjucatory proceedings "required by statute to be determined on the record after opportunity for an agency hearing," except in certain specified instances.[80] That limitation notwithstanding, agencies in fact provide a wide variety of hearings and a substantial literature has developed analyzing the range of procedures.[81] Much of the analysis was generated in response to the Supreme Court's decision in *Goldberg v. Kelly*,[82] in which the Court analyzed the minimal qualities a hearing must have to pass constitutional muster prior to the termination of welfare benefits. The Court demonstrated the paucity of the legal approach by showing a mindset that the only satisfactory way to do something is to emulate courts: while it denied it was requiring a formal hearing, it required most of the attributes of a Perry Mason trial.[83] The concern is not so much for the burden the court imposes, which is very likely substantial, but for the irrelevance of its dictates to solving the problem, and its insensitivity for the long run consequences. Happily, the case has not been followed rigorously.[84]

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[75] *Id.* The participants were representatives of the Chemical Manufacturers Association, the Rubber Manufacturers Association, the American Iron and Steel Institute, the American Petroleum Institute, the AFL-CIO, the United Steelworkers of America, the Oil, Chemical, and Atomic Workers International Union, and the United Rubber Workers. *Id.*

[76] *Id.*

[77] Mr. Doug Clark, special assistant to the OSHA Administrator, commented that the discussions between labor and industry will result in "a strong standard for worker protection" when the benzene standard goes into effect. *Id.*

One benefit that is likely to come from the experience is that it served to break the ground for the actual use of the process; doing so entails a new way of looking at regulatory questions that can pose practical problems for the participants. For example, it requires the parties to actually address what they want or need and to bear the responsibility for the decisions that are made. It is often far easier simply to blame a recalcitrant agency for "not understanding" than to decide what is appropriate. The representatives and the parties confronted this difficulty with admirable energy and ability. That will likely serve as the foundation for future efforts.

[78] *See generally* Comment, *supra* note 51.

[79] The preceding section on rulemaking was developed extensively both because research on it has been completed and because the newly recommended procedures are beginning to be used. The sections that follow will be more abbreviated and raise more questions than they put to rest. That is because research in this area is only now beginning for the Administrative Conference of the United States in conjunction with the Department of Justice.

As a result, it is appropriate to ask two questions: what kind of proceedings can be provided that meet the constitutional requirements for "some kind of hearing"[85] *and*, perhaps more importantly for our purposes, what sort of hearings can be offered as a voluntary alternative to more formal means. While, to be sure, agencies have used informal "modified hearings" for decades, given the current interest and the growth of experience with alternative means of dispute resolution, it is appropriate to ask when they can be used and how they need to be adapted to meet the dictates of the administrative process.

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[80] 5 U.S.C. § 554(a) (1982). Section 554(a) provides in pertinent part:

> (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved —
>
> (1) a matter subject to a subsequent trial of the law and the facts de novo in a court.

Id.

[81] *See* Friendly, *"Some Kind of a Hearing,"* 123 U. PA. L. REV. 1267 (1975); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

[82] 397 U.S. 254 (1970). The issue in *Goldberg* was "whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 255. The Court held that the recipient should have been afforded "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Id.* at 267-68.

[83] *Id.*

[84] *See* Mathews v. Eldridge, 424 U.S. 319 (1976). In *Mathews*, the Court explained that the nature of the required hearing could be determined by balancing the need for accuracy against the magnitude of the deprivation *and* the burden it would impose on the system in which the hearing is being held. *Id.* at 339-49. It may have reached its decision more by an ad hoc determination of the comparative magnitude of the deprivation of losing welfare rights as opposed to disability rights. *Id.* at 340-43.

[85] *See* Friendly, *supra* note 81, at 1267. Judge Friendly explained that the expression "some kind of hearing" is "drawn from an opinion by Mr. Justice White . . . . He stated, 'The Court has consistently held that *some kind of hearing* is required at some time before a person is finally deprived of his property interests.' " *Id.* (quoting Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974)) (emphasis added by Judge Friendly).

It is also necessary to ask whether *any* sort of process, in the form of an adaptation of trial-type hearings, is the appropriate response to achieving the desired goals. No one would seriously contend that a disagreement over how much postage should be placed on a package should be made by means of a trial. Rather, the better solution is likely to be some sort of "quality control" mechanism to ensure that the bureaucratic decisions are made with acceptable accuracy. Thus, as in any other dispute, the nature of the issue in question must be analyzed before the appropriate method for addressing it can be designed.[86]

A range of techniques might be used to provide alternatives to traditional forms of agency adjudication.

Mediation.[87] The decision that needs to be made may be quite appropriate for mediation or direct negotiations among the affected parties. The criteria that are described above can also be used to determine whether the issues would be suitable. The one major difference between negotiation and mediation in the administrative process and their private counterpart is that for at least some types of decision, the parties themselves cannot dispose of the issue but, rather, additional procedures may be necessary. It may be, for example, that agency officials who have the ultimate decisional authority are not present, or that the decision must be reconciled with existing public policy and hence subject to review by someone, or that the decision may affect other members of the public in such a way that they have the right to participate somehow in the decision before it is final. Thus, before undertaking discussions, the parties must analyze everything that must be done before a final decision can be reached and what the likelihood is that their efforts could be derailed before fruition. That analysis would include factors such as the participation of others after the agreement is reached[88] or disapproval by agency officials who did not participate. Mediation and negotiation in this context constitute a recognition that the great bulk of administrative hearings are settled, just like their civil counterparts. What is needed is to recognize and encourage the use of mediation as a means of fostering settlement.

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[86] *See* Mashaw, *Administrative Due Process: The Quest for a Dignatary Theory*, 61 B.U.L. REV. 885 (1981).

[87] One authority has described the role of a mediator as follows:

> A mediator is an impartial outsider who tries to aid the negotiators in their quest to find a compromise agreement. The mediator can help with the negotiation process, but he does not have the authority to dictate a solution. He might not even choose to suggest a final solution; rather, his purpose is to lead the negotiators to determine whether there exist compromises that would be preferred by each party to the no agreement alternative, and to help the parties select on their own a mutually acceptable agreement.

H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 23 (1982) (emphasis omitted).

Arbitration.[89] Arbitration is widely used in the private sector for a variety of subjects. [90] Several agencies and programs are beginning to use variants of it instead of formal administrative hearings. For example, the Merit Systems Protection Board (MSPB) began offering it as an alternative means of hearing appeals from adverse action determinations against government employees.[91] The Commodity Futures Trading Commission (CFTC) has just inaugurated a program of arbitration for customer claims of $15,000 or less.[92] Arbitration is also used in resolutions of disputes under the Superfund,[93] disputes involving patent issues,[94] disputes in age discrimination cases,[95] and for determining the payments from users of pesticide data.[96]

These programs typically use regular presiding officers as the arbitrators and, unlike traditional arbitration, the parties are not able to select the arbitrator from among a panel of candidates offered by some third party. The decisions are based on agency precedent but are not themselves precedential in any way. The cases which use arbitration procedures are those where time is quite important to at least one party,[97] and no complex factual or policy issues are presented. They are generally based on some sort of discovery or other method of requiring the parties to tender relevant data, not in exhaustive detail but at least sufficient for decision. The arbitrator's decision may be, as in the case of the CFTC, simply an award[98] or, as in the case of the MSPB, a brief recitation of findings of fact and conclusions of law. The agency itself has limited review authority, but even if it does not reverse the arbitrator's decision, it may not necessarily mean the agency agrees with the result. The review is summary, akin to the judicial review of an arbitration award, except that the agency will also look for gross errors in applying agency precedent. The full nature of judicial review has yet to be developed: to the extent the award becomes an agency "order," it is subject to judicial review under the Administrative Procedure Act. Just what sort of review that is to be and the record on which the court would base its review has yet to be developed.[99] In short, this area of administrative law is only beginning. It may be, however, that when all is said and done, it may substantially resemble some procedures that have been around a long time. Even if that is the case, the area will profit from sights gained by private sector experience.

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[88] For example, the Occupational Safety and Health Review Board can disapprove an agreement entered into between OSHA and a company that settles a citation issued by OSHA for violation of a standard.

[89] Professor Raiffa has described the role of an arbitrator as follows:

> An arbitrator (or arbiter), after hearing the arguments and proposals of all sides and after finding out "the facts," may also [like the mediator] try to lead the negotiators to devise their own solutions or may suggest reasonable solutions; but if these preliminary actions fail, the arbitrator has the authority to impose a solution. The negotiators might voluntarily submit their dispute for arbitration, or the arbitration might be imposed on them by some higher authority.

H. RAIFFA, supra note 87, at 23 (emphasis omitted).

[90] *See* Perritt, *supra* note 9, at 1266-70.

[91] Merit Systems Production Board: Practices and Procedures, 5 C.F.R. §§ 1201.200-.221 (1984).

[92] *See* 17 C.F.R. §§ 180.1-.6 (1983).

[93] *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9612(b)(4) (1982).

[94] *See* 35 U.S.C. § 135 (1982); 37 C.F.R. §§ 1.201-.288 (1984).

[95] *See* Equal Employment Opportunity Commission — Procedure — Age Discrimination in Employment Act, 29 C.F.R. §§ 1626.15-.16 (1983).

[96] *See* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a(c)(1)(D)(ii) (1982). The constitutionality of this provision has recently been upheld as a taking for public use. *See* Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862, 2882-83 (1984).

Minitrials.[100] The minitrial that has been developed for commercial litigation, in which the lawyers for the opposing sides present summaries of their cases in the presence of representatives of the parties who are authorized to negotiate a settlement of the dispute, has been used successfully in an enormously complex contract dispute with the National Aeronautics and Space Administration.[101] Considerable work is now being done on the application of the technique to more routine — but nonetheless complex — disputes that are heard before the Defense Department's Board of Contract Appeals. Although not quite administrative adjudication, the Department of Justice was reviewing the minitrial's applicability in settling litigation over contract claims in lieu of full trials before the courts. Interestingly, however, the government may be prohibited from entering into an arbitration agreement to resolve its controversies because it is prohibited from relying on arbitration to resolve claims involving questions of legal liability.[102]

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[97] That only one of the parties is in a hurry for resolution can present problems when both parties must consent to using the process, since the other one will often profit from delay and is not likely to consent to the process. In some cases, however, the parties would simply like to get the matter resolved, and hence both would agree. The question of whether one party can force the other into use of the process, or whether the forum agency can direct that it be used, needs to be explored.

[98] One reason for this is that a decision might have collateral effects, and it was thought that avoiding them might make the process attractive to some parties that would otherwise profit from delay.

[99] To the extent the parties agree to the process, just as in private sector arbitration, a limited form of judicial review may be appropriate on the ground that the parties made the choice that it was in their overall interest to use the process and hence should not complain if they lose. If, however, the process is forced on a party, a different standard might apply.

[100] *See* Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363 (1984).

C. *Other Forms of Administrative Action*

While the APA, and hence the legal writing, focuses virtually exclusively on rulemaking and adjudication, there are many other types of agency decisions, and many of them could be improved by invoking the ADR experience. For example, the staff of the Federal Energy Regulatory Commission regularly acts as a quasi-mediator among competing factions over environmental conditions that are placed on low-head hydroelectric plants.[103] Agencies have entered into mediation over a range of other decisions involving issues such as the protection of endangered species or the technologies required to meet standards issued under the Clean Air Act.[104]

What is needed for this category of decisions is a recognition of the availability of techniques that may be used by agencies to reach far more satisfactory decisions than would be possible if the agency arrogated them to itself.

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[101] Johnson, Masri & Oliver, *Minitrial Successfully Resolves NASA-TRW Dispute*, Legal Times, Sept. 6, 1982, at 13, col. 1.

[102] *See* 31 U.S.C. § 1346 (1982). This section prohibits the government from expending public funds for the work of any commission, council, board or similar group not authorized by law. The Comptroller General has opined that this section prohibits the government from entering into arbitration agreements to resolve questions involving the rights of the United States, absent express authorization. 8 Op. Comp. Gen. 96 (1928); 7 Op. Comp. Gen. 541 (1928). However, this bar does not prevent the government from entering into arbitration agreements for the purposes of determining a factual question of reasonable value, which does not impose any obligation on the government and does not leave "questions of legal liability" for determination by arbitrators. 20 Op. Comp. Gen. 95, 99 (1940); 22 Op. Comp. Gen. 140 (1942).

[103] *See* Kerwin, *Environmental Analysis in Hydropower Licensing: A Model for Decisionmaking*, ENVTL. IMPACT ASSESSMENT REV., June 1983, at 131, 134.

[104] *See* Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 2 n.6 (1981)

D. *Alternatives in Lieu of Agency Action*

Section II of this paper argued that much of modern regulation can be viewed as a combination of a failure of substantive standards by which to judge conduct and, perhaps even more importantly, the lack of a suitable mechanism by which rights can be enforced. Professor Perritt's hapless student is a perfect example.[105] When confronted with defects in a new car, he sought to enforce his right under the warranties against its manufacturer; he even invoked the dispute resolution mechanism created for this purpose by the auto company and the Better Business Bureau, but it was unavailing. Without satisfaction, he had to begin to build power, and that was successful only through the invocation of litigation. Coercion won out.

The question here is, what if the student were not a law student itching for some practical experience but rather someone for whom the prospect of litigation would be expensive,[106] emotionally wrenching,[107] and time consuming? The likely reponse would be: nothing, at least nothing short of a few letters and some frustration. If that is the case, then the lack of a dispute resolution mechanism (DRM) leads to a quasi-externality in which the buyer, who may have reasonably expected a product free of defects or the need of repair, must absorb the resulting costs. The classic response to that is regulation — an agency will prescribe conduct and prosecute violations.[108] Thus there is a clear trade-off between a reasonable, responsive DRM and regulation. If the arbitration program that the student used had teeth[109] and the arbitrator was a reponsible neutral party, the issue may well have been defused. The company would likely have corrected the difficulties instead of dallying, since it too would likely want to avoid the costs of subsequent proceedings and the ill-will generated by an unpopular result.

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[105] *See* Perritt, *supra* note 9, at 1223-24.

[106] The transaction costs of bringing a lawsuit against an auto company to force the repair of a defective automobile would likely exceed the value of the defects themselves. Thus, unless some statute, regulation, or common law precept provided for a shifting of the fees, the consumer might decide not to bring the litigation. Even if the American rule were abrogated, the consumer would still face the gamble of whether the claim was sufficiently meritorious to merit the award of fees.

[107] The plethora of currently popular books on assertiveness and winning through intimidation must surely reflect a timidity on the part of most individuals when faced with having to pursue something they believe is rightfully theirs in the face of either indifference or hostility.

[108] *See* notes 3-5 & 31-32 and accompanying text *supra.*

[109] It should be noted that in fact many of the arbitration/mediation programs for auto warranties are binding on the auto company. *See* Brenner, *Dispute Resolution Movement Gathers Momentum*, Legal Times, Mar. 21, 1983, at 27, col. 1. How they work in practice and what happens if their orders are disregarded need to be appraised.

As a result of all of this, one of the areas of administrative law that deserves careful attention is the establishment of private sector DRM's as a substitute for agency regulation or hearings. Several programs, for example, either require or permit private organizations to establish a forum for reviewing complaints or other issues that arise with respect to some particular activity.[110] If more of such programs are not created, the government agencies will have to play a larger role in resolving contests.

The use of DRM's is also likely to be an important aspect of proposals for "self-regulation." It is not enough simply for companies to argue that they are taking appropriate action "voluntarily," and hence there is no need for government intervention, unless there is a correlative right on the part of the beneficiaries of that action to enforce it in some manner. In some cases, of course, that will be through market transactions, but in others some sort of DRM will be needed to ensure that the promised actions, as in Professor Perritt's example, are discharged.

The pressing questions, then, are what should the characteristics of those DRM's be and what relationship will they have to the agency? How, for example, do you ensure neutrality? How coercive is the decision to be, and on whom? Is the DRM's use mandatory on the consumer? May a "defendant" decline its use, and, if so, with what result? What sort of due process rights are provided the consumer and the company against whom an order might run? What appeal rights are there and to what body — higher private sector authority, the agency, or a court? Is deference given the DRM's decisions or is there de novo review? How expensive will it be? How much will the reviewing authority be bound by precedent and how much will it seek justice under the circumstances? We will need to develop guidelines and insights into this emerging area. That will entail defining the procedures, or general principles, that are to be used in embedded dispute resolution mechanisms that will be sufficient to ward off government action.[111] The Federal Trade Commission has taken an initial step in this direction. Under the Magnuson-Moss Warranty Act, warrantors that incorporate a dispute settlement program must comply with the standards for those programs that the Commission has defined in its Rule on Informal Dispute Settlement Procedures.[112] Another example is the self-policing rules of the stock exchanges.[113] They operate under the supervision of the Securities and Exchange Commission, but with relative autonomy provided the procedural standards are met.

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[110] *See, e.g.*, Securities Industry Conference in Arbitration, Securities Exchange Act Release No. 13,470 (Apr. 26, 1977); Magnuson-Moss Warranty Act, 15 U.S.C. § 2310 (1982).

[111] The violation of the minimal rules of procedure could result either in the agency's resolving the underlying dispute or the agency taking action against the organization that was supposedly responsible for compliance with the general procedures. While invalidated under the statute under which it operated, the Federal Trade Commission took this approach in the vocational school rule when it imposed requirements that were prescribed for the purpose of preventing unfair practice, and

IV. THE FUTURE OF ADMINISTRATIVE PROCEDURE

The future of the use of alternative means of dispute resolution — or, if the term "dispute" or "conflict" is somehow inappropriate, of alternative ways of resolving issues that are complex and affect several parties — by the government appears promising. But it will not come automatically, and several hurdles exist that need to be addressed.

A. *Familiarity*

Undoubtedly the greatest need is simply to generate familiarity with the attributes of the range of alternative procedures. Agencies, like most people, are likely to be a little leery of unknown processes. As such, they would be unable to determine whether it would be in their interest to use them. Moreover, agencies always run the risk of judicial and congressional oversight, so they must also be confident that the new processes meet the demands placed on them from the outside.

This will come from several sources. First, it is always helpful if a complete model is created and analyzed so the agency can determine whether it meets its needs, and doing so removes some of the fear of the unknown. Second, the experience of other agencies is invaluable because it reduces the risk of developing a new approach. Third, the growing acceptance and experience in the private sector will lap over into the administrative process. That is clearly what is happening

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was prepared to treat a violation of those requirements as an unfair trade practice per se. *See* Katherine Gibbs School, Inc. v. FTC, 612 F.2d 658 (2d Cir. 1979). For further discussion of the *Katherine Gibbs* decision, see note 21 and accompanying text *supra.*

General Motors Corporation recently entered into a consent decree with the Federal Trade Commission over the repair and replacement of defective engines. The decree provides for a system of arbitration, which is binding on GM to determine the extent of liability and the repairs to be performed. This dispute resolution mechanism was accepted in the face of those who argued for more stringent mandatory actions. *See* General Motors Corp., 3 TRADE REG. REP. (CCH) ¶ 22,010 (1983).

[112] 16 C.F.R. § 703 (1984).

[113] *See* Silver v. New York Stock Exch., 373 U.S. 341 (1963).

with the minitrial, for example.[114] Fourth, it will come simply through talk and through discussions, such as this Symposium.[115]

B. *Particular Needs*

The government also has some particular needs that must be addressed in some manner.

1. *Negotiation/Mediation*

There is sometimes a peculiar problem that arises when the government reaches a decision by negotiation with the interested parties or, worse, with only some of them. The integrity of the negotiation process is generally assured by the self-interest of each party: no one will agree unless they think they are better off for doing so, as compared with the available alternatives. But it is not always clear just what the government's interest is, and someone could be accused of selling out its substantive interest to gain some other benefit, such as political favors or a new job for the bureaucrat. In the abstract such motives may be impossible to detect, and hence any government official who participates in the negotiations may be vulnerable to wholly baseless attacks. Thus, a timid official may be reluctant to risk that exposure. As a result, it may be necessary in some programs to create a mechanism to protect the integrity of negotiated decisions. That could come through a board of senior officials that reviews settlements,[116] a structured settlement process, publication of a proposed settlement and its supporting reasons for comment,[117] or some other mechanism.

2. *Acceptance*

Some officials are likely to resist the use of some of the alternatives on the grounds that they are inconsistent with the agency's role as the sovereign. That is especially the case with respect to mediation and negotiation, although it would also likely apply in arbitration. In the case of mediation/negotiation, the agency is more likely to have only an illusion of sovereignty rather than sovereignty itself. That results from a confusion of the *authority* to take some action with the *power* to do so. The reason negotiation may be an attractive alternative is precisely because of the countervailing power that others have. For example, an agency may unquestionably have the authority to issue a rule but its efforts to do so can be frustrated by others.[118] Thus, direct discussions may not be an abdication of authority or sovereignty but a very real way of furthering the agency's interest: it will continue to represent whatever interest it represents in traditional proceedings but is now in a position to gain information and acceptance of a mutually developed approach. Since the parties in interest concur in it, they are also more likely to be satisfied with the result and comply. But that reluctance to yield some perceived power must be overcome.

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[114] *See* Johnson, Masri & Oliver, *supra* note 101, at 13.

[115] For example, one government official had been skeptical about some of the alternative processes, but decided to accept their merit because they were frequently discussed with seeming approval by a variety of well-respected individuals and interests.

[116] The Attorney General must approve all tort claims settlements of litigation that are worth more than $25,000. Federal Torts Claims Act, 28 U.S.C. § 2671 (1982).

[117] The Federal Trade Commission publishes consent decrees for comment in the Federal Register.

3. *Institutionalization*

Premature institutionalization through codification or rigid requirements should undoubtedly be avoided, although there may well be pressure to do so. We clearly need time to experiment and get comfortable with the process. But, once we have some understanding of suitable approaches, some sort of institutionalization could be quite helpful in overcoming the difficulties discussed above.

V. CONCLUSION

In short, the future of alternative means of dispute resolution in the administrative process would appear to be strong. Indeed, the two have a long and complex history. Moreover, the needs of the administrative process have never been greater: to cope with massive caseloads; to develop new alternatives to coercive regulation; and to resolve enormously complex litigation.[119] The means of resolving issues that are currently under discussion hold a significant promise for the administrative process.

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[118] For a particular example of this, see text accompanying notes 68-69 *supra*.

[119] One can only imagine the enormous complexity that will be involved in litigation over the failure of two communication satellites that were unsuccessfully launched from the space shuttle. A controversy of similar complexity, indeed also involving satellites, was resolved through the use of a minitrial. Johnson, Masri & Oliver, *supra* note 101. Whether an alternative approach is merited in these instances, it is clear that the complexity of the issues presented are at an all time high, both in their technology and, when considering the social issues involved in government disputes, in their demography.

The Applicability of
Alternative Dispute Resolution Techniques
to
Government Defense Contract Disputes

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EXECUTIVE SUMMARY

Findings

The use of Alternative Dispute Resolution (ADR) techniques to settle government defense contract disputes holds promise as a quicker and cheaper alternative to the currently oversubscribed Board of Contract Appeals (BCA) system. However, with experience to date limited to two successfully resolved cases in the Army Corps of Engineers, additional empirical data is required. A pilot program involving disputes from all branches of the armed services to be resolved through ADR processes would provide a broader database from which decisions on future legislative amendments could be made.

Overview

Excessive litigation, heightened formality, and a growth in the number of contract dispute appeals have dramatically increased the time and cost of pursuing a claim before the government BCA. A proposal to employ ADR techniques such as arbitration, mini-trials, mediation, and factfinding to supplement the BCA system has drawn a generally favorable response. Widespread dissemination of information on these alternatives and their benefits is now needed, to overcome the misconceptions and general unfamiliarity that block their acceptance.

I. STATEMENT OF PROBLEM

The time and cost of resolving government contract disputes has risen dramatically over the years. The Boards of Contract Appeals (BCA), once a streamlined alternative to the congested courts, are now burdened by excessive litigation and increased formality. The volume of disputes presented before the Boards has also grown with the increase in federal procurement spending and accompanying oversight. The number of cases filed with the Armed Services Board of Contract Appeals (ASBCA), the largest administrative board of contract appeals, jumped from 974 cases in fiscal 1981 to 1273 cases in 1982. [1] As these Boards inherit the drawbacks of the courts they were designed to replace, officials are once again exploring faster and cheaper alternatives.

The Administrative Conference of the United States is currently examining the potential uses by federal agencies of arbitration, mini-trials, mediation, factfinding, and other alternative dispute resolution (ADR) techniques. These techniques are increasingly being applied to a broad range of conflicts in both the public and private sector, yielding settlements that are quicker, less expensive, less contentious, and generally more acceptable to the parties involved. Application of ADR techniques to date in the defense contracts arena has been limited to two mini-trials successfully conducted by the U.S. Army Corps of Engineers in a recent pilot program.

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1. Harter, Dispute Resolution Procedures and the Administrative Process, Comment Draft, 23 Feb 1986, p.94.

This report presents an analysis of the issues surrounding the introduction of ADR methods to the defense contract dispute settlement process, and offers some conclusions as to their feasibility.

Current BCA Procedure

Under the Contract Disputes Act of 1978, all government contracts must include clauses identifying the procedures for settling disputes resulting from the contract. The Act stems from a report issued by the Procurement Commission in the early 1970's that called for sweeping reforms in the procedures available for resolving government contract claims. The Disputes Clause defines "claims" as written demands or assertions seeking as a matter of right the payment of money, adjustment, interpretation of contract terms, or other relief. [2]

Dispute claims are filed by the government or the contractor with a contracting officer. The contracting officer has 60 days to issue his decision or, for claims over $50,000, to notify the parties of the time extension required. Failure to issue a decision within the stated time period defaults to a ruling against the claim. Decisions may be appealed within 90 days of the ruling to an administrative Board of Contract Appeals, or taken directly to the U.S. Claims Court within 12 months of the decision.

The Boards of Contract Appeals (BCAs) were established to provide an alternative to the Claims Court that was "more

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2. Goverment Contracts Report, para. 24,050.

informal and expeditious and less expensive than comparable proceedings in court." [3] Executive agencies either form their own agency Board if they handle a large volume of contract dispute claims, or arrange for appeals to be heard by another agency's Board. Claims under the Department of Defense are resolved in the Armed Services Board of Contract Appeals (ASBCA).

Special procedures for expedited disposition of smaller claims are available at the contractor's request. The Small Claims Procedure for disputes under $10,000 requires decision of the appeal, whenever possible, within 120 days; the Accelerated Procedure for claims under $50,000 requires a decision within 180 days.

Problems with the ASBCA Today

The ASBCA originally succeeded in providing a relatively quick, uncomplicated, and inexpensive means of resolving contract disputes. Contractors frequently appeared *pro se*, representing themselves, and claims were often settled within one year. Yet the ASBCA has become legally complex, and the time and costs of pursuing a claim have risen dramatically. The average case now lasts from two to four years, often longer. The expense and disruptive effect on management pose significant problems for both the contractors and the government.

Underlying Causes

According to the Administrative Conference of the United States, the added procedures which have complicated the BCA

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3. *Government Contracts Report*, Para. 24,225.

system derive from the following:

> "...judicial decisions establishing detailed due process requirement; lawyers seeking to preserve their clients' every arguable advantage; political compromises in Congress; a desire to control bureaucracy; the public's interest for open government and participation in its decisions; and even agencies' endeavors to survive a judicial "hard look"." [4]

The changing roles of lawyers and government contracting officers have also contributed to the problem.

Government Contract Lawyers. The increased legal complexity of the Boards parallels the growth of government contract lawyers. Law firms specializing in government contract law were non-existent prior to the introduction of the BCA system in 1968. As recently as 1971, 40 to 50 percent of the cases before the ASBCA were *pro se*'s with contractors representing themselves. When deregulation cut the demand for lawyers in other areas, the contract dispute arena became a lucrative substitute. "Government contract law was considered the bottom of the totem pole," a prominent attorney at United Technologies notes. "Now it has developed into a money-maker and area of expertise. Today I'd be suprised if there were four or five *pro se* cases a year." These lawyers brought to the Boards their understanding and use of legal complexities.

Contracting Officers. There is an unspoken reluctance of the contracting officers to make decisions that might be reviewed poorly by government auditors. The Judgment Act has created a

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4. Administrative Conference of the US, "Agencies' Use of Alternative Dispute Resolution Techniques", *Federal Register*, 8 April 1986, #11928.

monetary incentive to leave disputes unresolved as well, as the contracting officer is responsible for paying claims from his own budget only if he has issued the decision. As a result, it has become difficult to settle disputes at this level and more cases are sent to the ASBCA for judgement. Where in the past only the most difficult cases continued on, the contracting officer is now less effective in this screening role.

Advantages of ADR Techniques

Advocates propose supplementing the BCA system with ADR techniques, most notably the mini-trial. ADR methods are employed with success in the private sector, in areas ranging from family disputes and neighborhood justice centers to consumer complaints and union/management negotiations. When used in appropriate circumstances, ADR techniques facilitate dispute settlement at less cost, in a shorter amount of time, and with greater satisfaction for the parties involved than do traditional processes.

The main advantage of ADR techniques is legal simplicity, which translates into lower attorney fees and quicker decisions. Parties often agree upon a time limit for proceedings. They also offer privacy, since all proceedings are confidential and no transcript is made, thus exempting the proceedings from the Freedom of Information Act. The focus on cooperation, rather than the adversarial nature of court litigation, produces greater satisfaction with the final decision for both sides and helps to diffuse future tension in ongoing relationships.

Experiments to Date

Formal application of ADR techniques in the defense industry to date has been limited to two mini-trials in the past two years under an Army Corps of Engineers pilot program. Both were successfully resolved within the allotted time period of one to three months, at a considerable savings to the Corps. The larger case of the two involved a $55.6 million claim which was eventually settled for $17.2 million, and the contractor involved states that he would gladly use mini-trials for future disputes. The Naval Air Command is preparing for a mini-trial scheduled to take place in July 1986.

The first reported use of a mini-trial to solve a government procurement contract dispute was held between the National Aeronautics and Space Administration (NASA) and TRW, Inc. in 1982, involving a NASA communications satellite program. This successful mini-trial is reported to have saved more than $1 million in legal fees alone.

Requirements for Use of ADR

Not all contract disputes are suitable for ADR techniques. Appropriate cases contain factual disputes which do not require new interpretations of the law but for which clear legal rules or standards needed to resolve the issue have already been established by statute, precedent or rule. Cases must not involve the establishment of major new policies or precedents. ADR processes can be valuable when the issues are highly technical and require specialized expertise by the decisionmakers to reach a decision, or when parties desire privacy as in highly classified matters. ADR methods are inappropriate when the case significantly affects persons who are not parties to the proceeding or when a full public record of the proceeding is important.

II. **ANALYSIS OF ISSUES**

There are no forceful arguments for opposing the proposed application of ADR processes to government contract disputes. A request for comments on the Administrative Conference proposal in the April 8, 1986 Federal Register drew a generally favorable response, as did subsequent hearings on the subject in early May. There are, however, several issues which could potentially hinder its widespread acceptance. This section briefly discusses those issues and analyzes their implications.

The two major reservations expressed at the Administrative Conference hearings were raised by the Department of Justice and the General Accounting Office (GAO), and centered around the risks of investing the authority to settle disputes with non-government arbitrators. Both agencies warned against the legal implications of delegating major policy decisions to non-government participants unfamiliar with the law. Unlike disputes in the private sector, decisions based on agreement between the parties alone risk violation of existing laws, regulations, or decisions of the GAO. To ensure that settlements comply with legal restrictions, the arbitrators or government principals selected to settle a case must understand the governing statutes and/or consult legal experts prior to settlement. Use of top level managers familiar with regulations as mini-trial principals, similar to the Corps of Engineers' pilot program, will help alleviate this problem. Arbitrators will eventually learn the limits of the law as they participate in more disputes.

The GAO also fears an imagined bias of private arbitrators to resolve claims by compromise -- by splitting them down the middle. Parties might accept such a decision on a "nuisance argument" they say, simply thankful to end the dispute. I submit that this is a naive view of the sophistication of professional arbitrators. Such actions can be discouraged by requiring decisions to include a brief explanation of their factual and legal basis, as proposed by the Administrative Conference. The GAO would also retain its traditional settlement authority to approve all government payments.

The hidden agendas of participants may impede the promotion and acceptance of ADR processes. Many of the most likely instigators of such techniques can not be depended on to advance their use, as they may conflict with other interests.

Lawyers. Several factors deter lawyers from encouraging clients to use ADR methods to solve disputes:

-- quicker settlements and a diminished role for lawyers mean lower legal fees;

-- client control over the outcome may be psychologically threatening;

-- suggesting the use of non-adversarial methods may be perceived as a sign of weakness; and

-- many lawyers are unfamiliar with ADR processes.

Once clients become more aware of ADR techniques through other channels and insist on their use, lawyers will have to provide them. However, lawyers are not likely to assist with the educational process.[5]

Judges. Ideally, BCA administrative judges should identify those cases that are appropriate for ADR methods and suggest their use to the parties involved. Yet a recent study reveals that 60 to 70 percent of BCA judges are unwilling to "manage" hearings and feel no responsibility to resolve cases in the most expeditious way. According to the study, judges view themselves as merely onlookers who ultimately make the decision. However, if the Secretary of Defense ordered ASBCA judges to actively promote ADR processes as part of an effort to alleviate the backlog of cases waiting to be heard, these judges would have no other choice.

Management. One Corps of Engineers official reports that while top management was satisfied with the Corps' mini-trials, there was resistance at lower levels by managers who resented being overruled by their superiors. They complained that the time frame of the mini-trial was too short to afford a complete airing of their arguments. Yet Professor Eric Green of Boston University Law School, an expert on ADR, states that he has seen very complex cases boiled down for adequate presentation within a short time period. Until more empirical evidence of this is available to convince reluctant lower management, mini-trials and other ADR techniques may require advocacy from the top down.

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5. Goldberg, Green, and Sander, Dispute Resolution, pp. 487-489.

Government. Government procurement problems have received considerable attention in the press lately. To the extent that resolving a case is not the government's objective so much as sanctioning a contractor as an example to others, as in the case of General Dynamics, ADR processes will not be successful. The determination of both parties to achieve a settlement is a vital prerequisite.

Formalized ADR processes may attract cases that would otherwise be settled out of court back into the BCA system, limiting the potential for alleviating congestion and backlogs. Well over half of the contract dispute cases are currently resolved before they reach the BCA through traditional means of negotiation. Once the best alternative to the lengthy and expensive BCA, such informal settlements may be abandoned for the more structured ADR processes. To achieve a flexible capacity for providing ADR services, the government could retain a certain number of arbitrators, mediators, etc. "on call", to be employed when the full-time staff are oversubscribed.

Every effort must be made to protect the informal, unregulated spirit of ADR. As with anything in the government, the growth of ADR processes in the contract dispute arena will induce statutes to insure the conformity to standards, until the efficiency of these methods is threatened by the constraints. Oversight should be restricted to reviewing the legality of decisions to prevent stifling the process.

Differing Contractor Benefits

The potential benefits from the widespread implementation of

ADR techniques in the defense industry varies with the size and legal orientation of the contractor. A closer look at a large corporation such as United Technologies illustrates this point. The legal counsels at United Technologies state that, as a practice, they are less inclined to litigate against the government over a dispute and more likely to settle out of court. As the nation's 7th largest defense contractor, they acknowledge the influence possessed by large firms to negotiate settlements with government officials outside of BCA channels, explaining that large contractors have a lot to offer in such circumstances. They have the resources to write off a large claim if necessary and not feel the impact as much as smaller firms would. Those cases they do bring before the ASBCA usually involve policy issues or legal disputes which will establish precedent and therefore would be unsuited for ADR methods. As a result, one would expect that smaller and mid-sized contractors who depend on the BCA process would obtain a greater benefit from the availability of ADR methods, and are likely to be more receptive to government efforts to promote their use.

III. CONCLUSIONS

To date, no compelling arguments have been made against the use of ADR techniques to supplement the overworked BCA system. Both prior experience in the private sector and the limited application by the Corps of Engineers have produced attractive results. The government and contractors alike stand to benefit from the potential time and cost savings and decisions better tailored to their needs.

Indeed, the expanded role for contractors and management in the dispute process offered by ADR methods seems compatible with the larger movement toward self-governance and increased responsibility advocated by the President's Commission on Defense Management. In its report presented to the President in late February, the Packard Commission stressed the need for contractor accountability through the adoption of better internal auditing systems as a preventive means of monitoring compliance with procurement regulations. As the General Counsel of the Commission noted, the government wants the message clear that in the public-private partnership arena, the defense industry has a responsibility for self-review.

As a concept, the use of ADR techniques in the realm of government contract disputes has already been promoted. The governing Council of the Administrative Conference of the United States on June 3rd approved a draft proposal calling for agencies' adoption of ADR procedures. The proposal will be submitted for official approval before the entire Conference on June 20th.

Advocates must now focus on selling the use of these techniques on an individual basis. Widespread dissemination of information on the processes and their benefits is needed, to overcome the misconceptions and general unfamiliarity that block their acceptance. One step in this direction might be to organize symposiums for contractors and government officials where participants from the two successful Corps of Engineers mini-trials discuss their experience and are available for informal questioning. Of course, there will always be cases where parties simply want their day in court, and are willing to accept the lengthy hearings and high costs there. Yet both contractors and lawyers whom I spoke with stated they would use ADR procedures when appropriate if they were institutionalized as an available option.

With so little empirical data available on this subject, there is a pressing need for further experimentation. Two mini-trial cases are not sufficient to justify legislative amendments. The government should establish additional pilot projects that include other branches of the armed forces, followed by careful studies on the results. Administrative judges of the ASBCA should be directed to select the appropriate cases for the pilot program to ensure participation. The Corps of Engineers has experienced difficulty, despite earlier success in the program, to attract a third case for mini-trial use.

Only when further data has been accumulated can the decision be made on whether ADR techniques merit statutory changes. In this era of drastic budget cutting, however, any proposal which offers the potential for reducing costs should be energetically pursued.

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ALTERNATIVE MEANS OF DISPUTE RESOLUTION: PRACTICES AND POSSIBILITIES IN THE FEDERAL GOVERNMENT

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In the early nineteenth century Alexis de Tocqueville predicted that the law would become a secular religion in the United States, and that every important political question would be turned into a matter for law and litigation.[1] History once again has proven de Tocqueville's remarkable prescience. Over the past two decades, there has been a staggering increase in litigation.[2] Americans now are filing more lawsuits than ever before, and are litigating a wide variety of disputes that previously had been resolved through other means.[3]

At the same time, Americans also have extended the traditional adversarial process beyond the confines of the courtroom. From the perspective of a government attorney, the most significant extension has occurred in the area of administrative rulemaking, which now often contains all the elements of a judicial proceeding, including rules of evidence, testimony, and cross-examination.[4]

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[1] A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 231-41, 263-70 (G. Lawrence & J. Mayer eds. 1969) (1st ed. Paris 1835); Sarat, *The Role of Courts and the Logic of Court Reform: Notes on the Justice Department's Approach to Improving Justice*, 64 JUDICATURE 300, 301 (1981).

[2] The workload at the federal level has increased enormously over the past two decades. In 1960, for example, there were 59,284 civil cases inititated in the federal district courts, and 61,829 were terminated. 1983 DIR. ADMIN. OFF. U.S. COURTS ANN. REP. 114 [hereinafter cited as REPORT]. During the same year, 3,899 appeals were docketed in 11 regional courts of appeals, and those courts disposed of 3,173 appeals. *Id.* at 97. For the year ending June 30, 1983, there were a record 241,842 civil filings in federal district courts, up 17.3% over the previous year. *Id.* at 114. The number of cases filed in the United States Courts of Appeals also reached record levels in 1983. The Courts of Appeals docketed 29,630 cases. *Id.* at 97. The number of appeals filed in federal courts is now more than 600% higher than it was in 1960, *see id.*, and the increase at the district court level has been nearly 300%. *See id.* at 114. *See generally* Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 B.Y.U. L. REV. 617.

[3] As Chief Justice Burger noted in 1982, Americans have turned "to the courts for relief from a range of personal distresses and anxieties" and expected them "to fill the void created by the decline of church, family, and neighborhood unity." Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982).

Increased use of adversarial procedures in the courts and administrative process has had serious consequences.[5] Regulatory proceedings have become more lengthy and complex as a result of conflict between the government and private parties,[6] and have all too often led to unnecessary and wasteful regulations.[7] Moreover, lawsuits involving the government have become more numerous. The number of lawsuits in which the United States was a party grew by more than 155% in the last decade: from 25,000 new lawsuits a year in 1970 to 64,000 new lawsuits a year in 1980.[8] The accompanying costs to the government have increased at an even greater rate, with legal expenses of federal agencies estimated to have more than tripled in the decade of the 70's.[9] In a time of fiscal constraints, the government simply cannot afford these costs.

Excessive government participation in the adversary process has had other, less tangible, drawbacks. One of the most significant is the unnecessary antagonism it has generated between the government and private parties. Partly because of the conflict created in litigation and administrative proceedings, the public increasingly has tended to view the government as an adversary, rather than a servant of the public interest.

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[4] B. OWEN & R. BRAEUTIGAM, THE REGULATION GAME 23-24 (1978); Wright, *New Judicial Requisites for Informal Rulemaking,* 29 AD. L. REV. 59 (1977).

[5] The adversary process has many benefits. It provides a strong incentive for those interested in the outcome of a dispute to present the best arguments for the decisionmaker to consider, and it thus is "a powerful means of generating information." Harter, *Negotiating Regulations: A Cure for Malaise?,* 71 GEO. L.J. 1, 19 (1982). Moreover, because each party knows the contentions of the other parties, he can point out errors in competing positions. *Id.*; *see* Schuck, *Litigation, Bargaining, and Regulation,* REG. July-Aug. 1979, at 26, 31.

[6] Cramton, *Causes and Cures of Administrative Delay,* 58 A.B.A. J. 937, 938-39 (1972); Fox, *Breaking the Regulatory Deadlock,* HARV. BUS. REV., Sept.-Oct. 1981, at 97, 104; Harter, *supra* note 5, at 19; Morgan, *Toward a Revised Strategy for Ratemaking,* 1978 U. ILL. L.F. 21, 22 (1978).

[7] Fox, *supra* note 6, at 97. Fox has noted that the federal regulation of industry has suffered from a long history of confrontation between government and private businesses. As the regulatory process has become increasingly adversarial, both government and business have approached rulemaking as a battlegound in which combatants committed to fixed positions try to outlast each other through several stages of regulatory and judicial conflict. Instead of attempting to resolve the issue at hand, the parties approach the process as an opportunity to build a record to later bring to court. Moreover, the courts to which the parties finally turn to resolve their disputes are often ill-prepared to handle them. The parties do not settle the essential conflict between them, but rather expend their energies arguing minor procedural issues before a court which often has neither the technical expertise nor jurisdiction to resolve the underlying dispute.

[8] REPORT, *supra* note 2, at 121.

[9] Information obtained from the Bureau of Justice Statistics in June, 1983.

Recognizing these adverse consequences, this Administration has sought to reduce the intensity of battle between the government and the public. With respect to the courtroom, the Department of Justice, among other things, has established a policy of litigating as a last resort, rather than as a first reaction. We also have sought to reduce government participation in administrative battles by establishing alternative rulemaking procedures that are not dependent on adversarial proceedings. This article will examine a few of the steps taken by the federal government to put into practice alternative means of dispute resolution, and will discuss possibilities for other steps the government could take in the future.

I. ALTERNATIVE DISPUTE RESOLUTION PROCESSES: PRACTICES OF THE FEDERAL GOVERNMENT

Alternative dispute resolution processes were developed by the private sector as a means of resolving controversies without some of the costs associated with traditional litigation. Techniques such as arbitration and mediation have been used for many years in the labor field,[10] and have recently been extended to minor disputes involving consumers, landlords and tenants, family members, and assorted damage claims.[11] Unfortunately, governments, and particularly the federal government, have been slow to adopt these techniques.[12] Federal officials have just begun to recognize the potential of alternative dispute resolution processes and only recently have they tried to apply these processes in resolving controversies in which the government is a party.

A. *Alternatives to Traditional Rulemaking*

Perhaps the most promising alternative to traditional adversarial rulemaking now being explored in a number of federal agencies is "negotiated rulemaking." This procedure contemplates an informal process of bargaining among parties affected by a proposed regulation. The process is intended to culminate in an agreement that becomes the basis for an agency rule.[13] The procedure, still in its infancy, usually takes one of two forms.[14]

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[10] *See generally* M. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT 315 (1968).

[11] *See generally* E. JOHNSON, V. KANTOR & E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES (1977); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

[12] *See infra* notes 57-58.

[13] *See generally* Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871 (1981).

[14] *See* Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 164-68 (1972); Reich, *Regulation by Confrontation or Negotiation?*, HARV. BUS. REV., May-

In one approach, the government agency merely acts as overseer of the negotiations. The agency begins the process by publishing a description of a proposed rule topic in the Federal Register and a general invitation to participate in negotiations. The agency selects a manageable number of representatives from those responding to participate in the bargaining sessions. Agency officials are not present at these sessions. The negotiators develop a proposed rule through the process of compromise, which the agency then publishes along with a statement of basis and purpose drafted by the negotiators. Thereafter, the agency receives public comments, evaluates the negotiated proposal, and promulgates a final rule.

In the second form of negotiated rulemaking, the agency actually participates in the negotiations. After a number of private representatives are selected as negotiators, the agency presents them with its interpretation of the statute involved. Negotiations then begin, and because the agency is one of the negotiators, it must agree to all bargains. If the negotiators cannot agree, the notice and comment process begins under the current system. If the parties reach an agreement, the agency publishes the bargain as a proposed rule and accepts public comment.

In either form, negotiated rulemaking offers a number of potential advantages over traditional adversarial rulemaking.[15] For example, negotiation may yield better rules. While the adversary system encourages parties to take extreme positions,[16] negotiation yields a pragmatic search for intermediate solutions. In negotiation, one party is more likely to discover and to consider economic, political, and other constraints on another party. In sum, the parties are more likely to address all aspects of a problem in attempting to formulate a workable solution.[17]

Another possible advantage is that negotiated rulemaking may increase the acceptability of the rule promulgated by the agency. As one commentator has noted:

> The adversary process usually declares winners and losers and designates a "right" answer. Thus, adversaries may see each other and the agency as enemies and grow alienated from the result. Negotiation, by contrast, fosters detente among participants and has few clear-cut losers. All suggest solutions and ultimately believe they have at least partly consented to the compromise

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June 1981, at 82-86; Schuck, *supra* note 5, at 26, 32-34; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1790-802 (1975).

[15] Phillip Harter has noted a number of drawbacks to the adversarial process in his article on negotiated rulemaking. Harter, *supra* note 5, at 18-21; *see also* 1 C.F.R. § 305.82-4 (1983) (Administrative Conference recommended procedures for negotiating proposed regulations).

[16] Darman & Lynn, *The Business-Government Problem: Inherent Difficulties and Emerging Solutions*, in BUSINESS AND PUBLIC POLICY 54 (J. Dunlop ed. 1980).

[17] *See* Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 658-60 (1976).

rule.[18]

While negotiated rulemaking may offer these and other advantages,[19] there are a number of practical and legal constraints to its use. Not all issues lend themselves to negotiations. This is the case with most all-or-nothing issues, such as whether to require airbags in automobiles.[20] Broad issues that do not directly affect a narrowly concentrated group of persons or entities are also unlikely to be capable of resolution in negotiated rulemaking.[21]

It may also be difficult to select the appropriate representatives for the negotiations. The proposed rule will affect large numbers of people in many cases, but effective negotiations will be possible only if the number of negotiators is kept to a manageable size.[22] Thus, negotiated rulemaking typically will require that groups or persons with a common viewpoint be represented by a single negotiator. The practical considerations aside, it may be legally imperative that this representative be an appropriate spokesperson for the affected group, so as to satisfy the Administrative Procedure Act, which requires that informal rulemaking reflect fair consideration of all affected interests,[23] and due process, which mandates that valid interests not be arbitrarily excluded.[24]

Perhaps the greatest obstacle to negotiated rulemaking is the statutorily and judicially imposed requirement for "open" agency proceedings. Experts in the area of negotiated rulemaking believe that it is a process best conducted in private.[25] Negotiators need to share freely their positions on different issues, without fear of reprisal from those not involved directly. The parties must be able to exchange confidential data that might be useful to the negotiations, without destroying its confidentiality. Similarly, a negotiator must have some assurance that a position he announces or data he presents will not be used against him in another forum, such as in litigation or a later adversary rulemaking.

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[18] Note, *supra* note 13, at 1877.

[19] Negotiation can also reduce the costs of the decisionmaking process. First, it reduces the need to engage in defensive research in anticipation of arguments made by adversaries. It also can reduce the "time and cost of developing regulations by emphasizing practical and empirical concerns rather than theoretical predictions." Harter, *supra* note 5, at 28, 30.

Negotiations also may reduce judicial challenges to a rule because "those parties most directly affected, who also are the most likely to bring suits, actually would participate in its development. Indeed, because the rule would reflect the agreement of the parties, even the most vocal constituencies should support the rule." *Id.* at 102.

[20] Note, *supra* note 13, at 1880.

[21] Boyer, *supra* note 14, at 166.

[22] Darman & Lynn, *supra* note 16, at 54-55.

[23] Moss v. C.A.B., 430 F.2d 891, 894-95 (D.C. Cir. 1970); 5 U.S.C. § 553(c) (1982).

[24] *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564 (1973). *See generally* Stewart, *supra* note 14, at 1756-60.

[25] *See* R. FISHER, PRINCIPLED NEGOTIATION: A WORKING GUIDE 142-47, 202 (1979); Fox, *supra* note 6, at 104; Harter, *supra* note 5, at 84.

Nevertheless, a number of legislative and judge-made rules may limit the use of private negotiations for rulemaking. Three well-known statutes immediately come to mind. The Sunshine Act requires that meetings of collegial agencies be open to the public.[26] The Freedom of Information Act requires agencies to make their records available to the public.[27] Under the Advisory Committee Act, the negotiators might be required to publish minutes of each session in the Federal Register[28] and meet in public.[29]

The rule against ex parte communications may be the most serious judicially imposed obstacle to negotiated rulemaking where an agency participates as a negotiating party.[30] Generally, this rule prohibits an agency from communicating privately with affected groups.[31]

To the extent these rules interfere with negotiated rulemaking, exemptions should be considered. Exemptions would guarantee negotiations the privacy and flexibility needed for success, without sacrificing the concerns these rules were designed to protect. The negotiation process itself will supply virtually the same safeguards that public meetings provide and, in any event, the product of negotiation will be published as a notice of proposed rulemaking so that others will have an opportunity to examine any agreements, and participate in the rulemaking process before the rule becomes final.

In the past year, two federal agencies began experimental projects to test the effectiveness of negotiated rulemaking. In February of 1983, the Environmental Protection Agency (EPA) published a notice in the Federal Register stating that it would "use face-to-face negotiations among interested parties in place of EPA's usual regulation development process" as a demonstration project for two, as of yet unselected, rules.[32] EPA explained that its purpose was to test the value and utility of regulation by negotiation, determine the type of regulations that are most appropriate for negotiated rulemaking, and explore procedures that foster effective negotiations.[33] EPA also announced that it would hire an outside contractor experienced in the use of third party intervention techniques to assist in identifying the appropriate parties and in conducting the negotiations.[34] The goal of the negotiations will be to develop a Notice of Proposed Rulemaking that reflects a consensus among the negotiators.

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[26] 5 U.S.C. § 552(b) (1982).

[27] *Id.* § 552(3).

[28] *Id.* app. I § 3(2)(C).

[29] *Id.* §§ 10(6), (c), 11.

[30] *See generally* Note, *Ex Parte Contacts Under the Constitution and Administrative Procedure Act,* 80 COLUM. L. REV. 379 (1980). The Administrative Procedure Act prescribes procedures for submitting information to federal agencies engaged in informal rulemaking. *See* 5 U.S.C. §§ 551-706 (1982). The APA, however, does not explicitly prohibit oral or written submissions outside these formal channels. In 1976, Congress amended the APA to prohibit ex parte contacts in formal rulemakings governed by 5 U.S.C. §§ 556-557, and conducted under elaborate trial-type conditions. Pub. L. No. 94-409, § 4, 90 Stat. 1241, 1246 (current version at 5 U.S.C. § 557(d) (1982)). The legislative history of the Act expressly acknowledges that this prohibition does not apply to informal rulemaking. S. REP. No. 354, 94th Cong., 1st Sess. 35 (1975), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 1241, 1247.

[31] Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir.) *cert. denied,* 434 U.S. 829 (1977), *questioned in,* Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981); Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

[32] 48 Fed. Reg. 7,494-95 (1983).

In May of 1983, the Federal Aviation Administration (FAA) published a notice of intent to form a negotiating committee to develop a report concerning flight time, duty time, and rest requirements for flight crew members.[35] For more than thirty years, the FAA's flight and duty time regulations have remained essentially unchanged despite dramatic changes in the equipment and operating practices of air carriers. These regulations have been a constant source of contention between the carriers and employees, and have been the subject of frequent requests for enforcement actions: more than 1,000 pages of interpretive rulings have been generated on the regulations.[36] Based on its inability to promulgate mutually acceptable revised regulations through traditional rulemaking, the FAA has set up an advisory committee composed of persons affected by flight and duty time rules which is currently negotiating to reach a consensus on a new rule.

Encouraged by the potential benefits of negotiated rulemaking, Senator Levin[37] and Representative Pease[38] have each introduced bills in Congress to establish a procedure for the formation of negotiating commissions. Both bills call on the Administrative Conference of the United States to form these commissions and to determine appropriate issues and representatives for affected interests.

From these and other experiments, we can determine whether negotiated rulemaking provides an effective alternative to traditional adversarial rulemaking procedures. It clearly offers the possibility of enhancing our present system of regulation, and agencies should be encouraged to experiment with negotiated rulemaking as an alternative means for dispute resolution.[39]

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[33] *Id.* at 7,495.

[34] *Id.*

[35] 48 Fed. Reg. 21,339 (1983).

[36] *Id.* at 21,340.

[37] S. 1823, 98th Cong., 1st Sess., 129 CONG. REC. S11,715 (daily ed. Aug. 4, 1983).

[38] H.R. 996, 98th Cong., 1st Sess., 129 CONG. REC. H177 (daily ed. Jan. 26, 1983).

[39] Phillip Harter has cited a number of innovative regulatory procedures which could improve the factual bases of rules, reduce formality, and accommodate competing interests. Harter, *supra* note 5, at 24-26.

B. *Alternatives to Litigation*

In addition to using alternative techniques to resolve regulatory disputes, the government also can use alternatives to the adversary process to resolve more effectively disputes that have reached the stage of litigation. In a sense, the government already has devoted much energy to developing alternatives to traditional litigation through the establishment of administrative tribunals. The administrative review process can provide a speedy and effective alternative to litigation because of the unique expertise of Administrative Law Judges and the potential informality of the proceedings.[40] In modern times the administrative process has become increasingly formalized and cumbersome.[41] As a result, the federal government has for some time been exploring other alternatives.

1. Arbitration

A number of federal agencies have used or are gearing up to use arbitration as a means of resolving disputes. The Department of Justice has been participating in an experiment with compulsory pre-trial arbitration.[42] This program, which has been in effect in only a select number of federal districts, calls for arbitration of certain cases, where small amounts of money are at stake and where the cases turn on factual rather than legal issues. The parties are required to go to arbitration, but the arbitrator's decision is not binding. The party rejecting the arbitrator's decision is required to pay the costs of going to trial if the judgment is not substantially better for him than the arbitrator's decision.

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[40] *See* Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973).

[41] *See* note 4 *supra*. The effectiveness of the adminsitrative process has been hampered by the potential for judicial review of administrative decisions. Knowing that the courts can be used as a mechanism of delay or to minimize the discretion of ALJs, private parties have not always used the administrative process as effectively as possible. It has been used by lawyers as an opportunity to build a record to later bring to court. Increased resort to judicial review of agency determinations is also due to the court's injecting themselves into the administrative process. In the past decades, courts began to require agencies to explain the reasons for their actions in greater detail, *e.g.*, Portland Cement Ass'n. v. Ruckelshaus 486 F.2d 375, 392 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), and to establish that they have taken a hard look at all relevant factors. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 257-72 (1979); *see* United States Lines v. FMC, 584 F.2d 519, 533-36 (D.C. Cir. 1978); United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240, 252-253 (2d Cir. 1977). The court has also tightened the standard of judicial review, discarding the "rational basis" test in favor of the "hard look" standard of review. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *see* DeLong, *supra*, at 286 ("Prior to about 1970 the courts would uphold a rule unless it were demonstrably irrational.").

[42] E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (rev. ed. 1983).

The Department of Labor's Merit System Protection Board is currently adopting a new appeals arbitration procedure for resolving matters subject to the appellate jurisdiction of the Board.[43] This appeals procedure will be used in four regional offices for approximately one year, and then will be carefully evaluated to determine if it should be extended. Under the procedure, the appellant may request that his petition be processed under appeals arbitration. If granted, the Regional Director appoints an arbitrator from a panel of presiding officials who are designated for the new procedure.[44] The award is final, but there is a limited right to petition the Board for review.[45]

2. Mediation

Mediation also has been used by a number of agencies as an alternative to or prerequisite for litigation. The Environmental Protection Agency was the first federal agency to formally provide for mediation.[46] Under its procedures, the Appeals Board, in consultation with the parties, may require mediation to resolve a dispute already subject to administrative adjudication. The result of the mediation is not binding unless the parties agree otherwise in writing.[47]

A similar process has also been adopted by the Department of Health and

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[43] 48 Fed. Reg. 11,399 (1983) (to be codified at 5 C.F.R. § 1201).

[44] *Id.*

[45] HUD also has experimented with arbitration. The Land Sales Fraud Division, which administers the Interstate Land Sales Fraud Disclosure Act, uses arbitration as an alternative to litigation and to fashion consent decrees. The Divison sues land developers who have engaged in fraud in selling land developments to the public. The Commodities Futures Trading Commission uses an industrial association arbitration service to hear complaints by consumers against brokers. The Federal Trade Commission uses the Better Business Bureau to arbitrate a large number of consumer complaints. Finally, the Securities Exchange Commission has assisted stock exchanges in setting up their own arbitration service. *See generally* Simon, *U.S. Tries Alternatives to Litigation*, NAT'L L.J., June 27, 1983, at 31.

[46] Mosher, *EPA, Looking for a Better Way to Settle Rules Disputes, Tries Some Mediation*, ____ NAT'L J. 504 (1983). Prior to EPA's formal adoption of mediation, the technique had been used by various groups and agencies to resolve environmental disputes. Environmental mediation won its spurs in 1974, when two mediators settled a dispute between the Army Corps of Engineers and local conservationists involving a flood-control dam on the Snoqualime River near Seattle. As of this year, more than 40 major environmental disputes have been settled through mediation. Moreover, in the past three years a number of states have passed laws specifying how negotiations and mediation procedures can be used to resolve environmental disputes. *Id. See generally* Susskind, *Environment and Mediation and the Accountability Problem*, 6 VT. L. RV. 1 (1981); Sviridoff, *Recent Trends in Resolving Interpersonal, Community, and Environmental Disputes*, ARB. J., Sept. 1980, at 3.

[47] 40 C.F.R. § 123 (1983).

Human Services (HHS). For a decade, federal agencies administering programs of grants-in-aid have used grant appeal boards to adjudicate disputes between the granting agencies and their grantees.[48] The first of these boards was established by the Department of Health, Education, and Welfare (HEW) in 1973, and the board has been continued under new and revised regulations by HHS.[49] Even before it had a regulation formally authorizing mediation of pending grantee appeals, the HEW/HHS appeals board often pushed grantees and the agency to the conference table. The Board institutionalized this practice in 1979 by routinely informing the parties that the Board favored efforts by the parties to resolve disputes by direct discussion.[50] In August 1981 HHS issued a final rule formally providing for mediation to resolve disputes.[51] Mediation may be instituted under this rule either at the suggestion of a party to the pending case or upon the Board's initiative. Once instituted, it has been the Board's practice to suspend its proceedings until mediation is concluded.[52]

3. Governmental Entities

Two important governmental entities that have encouraged use of alternative dispute resolution processes, and helped resolve disputes through such processes, are the Community Relations Service (CRS) and the Federal Mediation and Conciliation Service (FMCS).

The CRS, a component of the Department of Justice, is required, under Title X of the Civil Rights Act of 1964,[53] to provide "assistance to communities and persons therein resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color or national origin, which impair the rights of persons in such communities under the Constitution or laws of the United States which affect or may affect interstate commerce."[54]

CRS conciliators and mediators have attempted to fulfill these objectives from ten regional offices. The CRS has recently taken a more active role. In 1982, the agency processed 1,996 alerts to potentially serious racial/ethnic conflicts, almost 500 more than in the preceding year.[55] From those alerts, 893 new cases were opened in which the CRS was called upon to help resolve disputes arising from school desegregation, police conduct, and resettlement of Cubans, Haitians and other refugees and immigrants.[56] Through the efforts of the CRS, we have helped reduce racial harassment and tensions, improve cooperation between the police and the minority communities, and avoid needless and time-consuming court litigation. The FMCS has played an important role in mediating disputes in the area of labor-management relations. The FMCS was created by the Labor Management Relations Act of 1947 for the purpose of preventing disruptions in the flow of interstate commerce resulting from labor management disputes by providing mediators to assist disputing parties in the resolution of their differences.[57] The FMCS mediators have no law enforcement authority, but rather work with the parties to settle disputes. The FMCS has closed approximately 20,000 disputed cases in recent years, holding mediation sessions with both labor and management present in about half these cases.[58]

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[48] 38 Fed. Reg. 9,906 (1973) (codified at 45 C.F.R. § 16.1 (1973)).

[49] 45 C.F.R. §§ 16.1-16.23 (1983).

[50] Barrett, *Mediation and Adjudication: The Double Track Approach,* 30 Fed. B. News & J. 436 (1983).

[51] 45 C.F.R. § 16.18 (1983).

[52] Mosher, *supra* note 46.

[53] 42 U.S.C. § 2000(g) (1976).

[54] *Id.* The CRS function is also addressed in two other statutes. Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations on the basis of race, color, religion or national origin, provides that a federal court may refer a civil action under Title II to CRS "for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance." 42 U.S.C. § 2000a-3d (1976). Title VIII of the Civil Rights Act of 1968 requires that the Secretary of HUD "cooperate with and render technical and other assistance to the Community Relations Service as may be appropriate to further its activities in preventing or eliminating discriminatory housing practices." 42 U.S.C. § 3608(d) (1976).

The FMCS is active not only the private sector, but also in the federal government. Approximately 60% of federal employees are represented by a union and have concluded a collective bargaining contract.[59] Under Executive Order 11,491, which became effective on January 1, 1970, the FMCS provides mediation and other assistance in disputes arising from negotiations between federal agencies and labor organizations.[60] Title VII of the Civil Service Reform Act of 1978[61] gave the FMCS statutory authority to carry out this function, providing that the FMCS "shall provide services and assistance to agencies and exclusive representation in the resolution of negotiation impasses."[62]

4. Other Alternatives

The federal government has used a number of innovative, alternative techniques to resolve or settle disputes in several difficult cases. One of the best known examples occurred in a case in which contractors attempted to recover additional compensation because the National Aeronautics and Space Administration (NASA) imposed certain technical requirements three years after the contracts at issue had been awarded.[63] Because of the complexity of the issues and the anticipated length of discovery and the hearing, the parties held a "mini-hearing" to help resolve the dispute.

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[55] 1982 COMMUNITY REL. SERV. ANN. REP.

[56] *Id.*

[57] Labor Management Relations Act of 1947, §§ 202, 203, 61 Stat. 136, 153-54, (current version at 29 U.S.C. §§ 172, 173(d) (1976)).

[58] 1981 FED. MEDIATION & CONCILIATION SERV. ANN. REP. 45.

[59] *Id.* at 13.

[60] 34 Fed. Reg. 17,605 (1969), *reprinted in* 5 U.S.C. § 7101 app. at 793 (1982).

[61] Pub. L. No. 95-454, § 701, 92 Stat. 1111, 1208 (1978).

[62] 5 U.S.C. § 7119(a) (1982).

In a mini-hearing or mini-trial, both sides agree to present their cases in summary form to a panel, which may be composed of senior officials from each side or neutral advisors or a combination of the two. At the end of the mini-hearing, the panel does not render a decision, but rather comments on the strengths and weaknesses of each side's presentation. The parties are then in a better position to evaluate both their own and the other side's case, and thus to conclude a settlement.[64]

Unlike most mini-trials, in the NASA mini-hearing the parties did not negotiate a detailed written agreement specifying the procedures to be followed. Rather the parties simply agreed to exchange written briefs on technical, cost, and legal issues, and then to have top management, with written authority to resolve the technical issues, come together to hear summary presentations by counsel. During a one-day mini-hearing, the Director of the Goddard Space Flight Center, the NASA Associate Administrator for Tracking and Data Systems, and two senior officials for the contractors heard two-and-a-half hour presentations by counsel for each side. No witnesses were called. The next day the four persons that heard the arguments met privately, and a few days later an agreement was signed resolving the issues.

The NASA mini-hearing saved more than $1 million in legal fees alone. A workable, mutually beneficial solution was developed by involving top management that was superior to any decision that could have been imposed by a third party.[65]

The government also used an innovative dispute resolution technique in connection with litigation commenced April 1, 1976, over the value of the properties transferred by seven bankrupt railroads to Conrail. While the government estimated a $500 million valuation, Penn Central, one of the bankrupt railroads, estimated its holding at more than $4 billion. The case would have involved a huge expenditure of public resources in litigating the value of the property. The parties settled on November 18, 1980 for $2.1 billion.[66]

The parties were able to achieve this relatively quick settlement because they adopted a "two-team" approach, consisting of a "settlement" team and a "litigation" team. Corporate specialists, who were put on the "settlement" team, could more easily understand the financial analysis than the litigators. In addition, the "settlement" team was better able to maintain the privacy needed for disclosure of confidential settlement information.[67]

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[63] Johnson, Massi & Oliver, *Minitrial Successfully Resolves NASA-TRW Dispute*, LEGAL TIMES WASH., Sept. 6, 1982, at 16.

[64] *Business Saves Big Money with the 'Minitrial,'* BUS. WEEK, Oct. 13, 1980, at 168.

[65] *Id.*

[66] Lempert, *Complex Cases Demand Lawyers for All Seasons*, LEGAL TIMES WASH., July 27, 1981, at 1.

II. ALTERNATIVE DISPUTE RESOLUTION PROCESSES: POSSIBILITIES FOR THE FEDERAL GOVERNMENT

Virtually everyone agrees that alternative dispute resolution processes can offer a more speedy and cost-effective means of resolving disputes than traditional adversarial processes in some circumstances. While those in both the private sector and government find alternative means of dispute resolution attractive in theory, they have been less willing to adopt these techniques in practice in disputes where the government is a party.

Government resistance to alternative mechanisms for dispute resolution stems from a number of different sources. One of the most important causes of this resistance is the fact that government lawyers have traditionally been unconcerned with the cost of defending and prosecuting disputes in court and in administrative proceedings. Perhaps because these costs, though immense in absolute terms, are such a relatively small part of the national government's budget, the public has not pushed for cost-effective dispute resolution by the government.

Those who manage the government's litigation may also be reluctant to use informal dispute resolution processes because of a fear that they will be criticized. For certain issues, such as public health and safety, the perception remains with some that private, informal hearings are inadequate, and that public officials who allow such hearings may be abusing their power.

Finally, and on the more technical level, government lawyers sometimes are reluctant to use alternative means of dispute resolution because it is not clear whether Congress has authorized such means. Where Congress has, it still may be unclear who in the agency has power to approve their use or how an agency pays for the nonjudicial forum.

The government is in no sense solely to blame for its minimal use of alternative means of dispute resolution. The private sector also has resisted. Although private parties are willing to accept as final and binding decisions of nonjudicial officials in private disputes, the private sector has been considerably less inclined to accept finality in disputes with the government. Private parties have long believed that justice cannot be insured in adversarial proceedings with the government unless they have available an endless administrative and judicial review process. As a result, our administrative tribunals, which could serve as effective alternatives to court litigation, have become places to build a record to later bring to court.

One final constraint on the use of alternative dispute resolution techniques is that they require lawyers both inside and outside government to accept new attitudes and learn new skills. Litigators, by long training and perhaps by temperament, will typically defend tenaciously all points of their client's position, put forth every claim and every argument that can be made on their client's behalf, and seek every possible procedural advantage. These skills have a place in full-scale litigation, but they are the type of skills that tend to create conflict rather than resolve it. In order for alternative means of dispute resolution to become most useful, lawyers must be willing to relinquish secondary claims and arguments to achieve their client's objective. They must be willing to discuss issues in a spirit of candor, and forego minor tactical advantages to achieve a workable consensus. Fortunately, attorneys seem to be quickly adopting these new attitudes as they face increasing pressures from clients to render legal services in a more cost-effective manner.

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[67] *Id.*

To encourage more effective use of alternative means of dispute resolution, a number of steps might be taken. One way to more quickly implement alternatives to court litigation in government is to make our administrative process more effective. Administrative Law Judges often have unique expertise in their area, and the informality of the administrative process can result in more speedy and effective resolution of disputes at times, but to improve the effectiveness of the administrative process, we must be willing to do such things as limit and, in some cases, eliminate judicial review.

The government could also develop a mechanism to give its lawyers a greater incentive to resolve disputes in a cost-effective manner. The federal government is only now beginning to monitor its lawyers to ensure that the costs of their efforts do not exceed the benefits, and to ensure that they are not wasting government money and resources. This type of review process is essential to increase the use by government of alternative dispute resolution mechanisms.

Another important step would be to develop a highly effective clearinghouse to collect, process, and disseminate information on the use of alternative means of dispute resolution in government cases. The clearinghouse could enable government attorneys to stay up-to-date on successful and innovative alternative dispute resolution mechanisms that have been applied by their colleagues, and could provide lawyers with information regarding the most effective dispute resolution devices for various types of controversies. It also could make known which theoretically promising techniques have proven unproductive in practice. The Department of Justice has recently set up such a clearinghouse, and plans to implement a training program for line attorneys on the use of alternative techniques. The Department also intends to work with its client agencies to help them develop their own training programs on alternative means of dispute resolution so that the clients will be aware of these options.

Finally, legislation must be enacted and new rules must be promulgated if alternative means of dispute resolution are to become more prevalent. Legislation to facilitate the formation of negotiating commissions would allow for a comprehensive evaluation of the effectiveness of negotiated rulemaking. In addition, legislation must be considered that would more clearly give agencies authority to use alternative techniques. In turn, agencies must promulgate regulations to give Administrative Law Judges and other government officials appropriate discretion to request that parties use alternative means of dispute resolution.

Our constant resort to "trial by battle" to resolve both traditional litigation and regulatory conflicts has had a number of adverse consequences. Excessive court litigation has not only wasted government money, but has also resulted in unnecessary antagonism between the public authorities and the public itself. Regulatory conflicts between the government and private parties have led to ineffective regulations and to even more complex, time-consuming litigation in our courts. Less adversarial methods must be found and implemented to avoid needless waste of scarce resources.

Lord Bacon once observed:

> [He] that will not apply new remedies must expect new evils; for time is the greatest innovator; and if time of course alters things to the worse, and wisdom and counsel shall not alter them to the better, what shall be the end?[68]

It is clearly time for us to use "wisdom and counsel" to consider reforming our system of resolving disputes and to be unafraid to apply "new remedies" to achieve these reforms.

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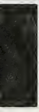
[68] THE ESSAYS OF FRANCIS BACON 109 (M. Scott ed. 1908).



2. BACKGROUND ON DISPUTE RESOLUTION MECHANISMS

A. Mediation

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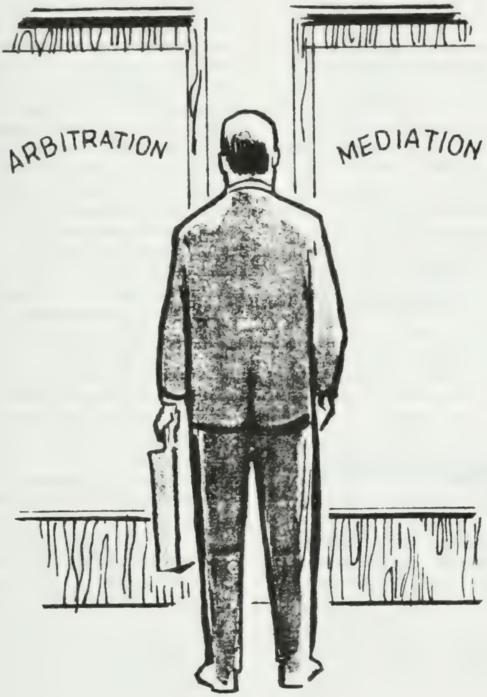

Arbitration vs. mediation—explaining the differences

by John W. Cooley

An amazing number of lawyers and business professionals are unaware of the differences between arbitration and mediation. Their confusion is excusable.

In the early development of the English language, the two words were used interchangeably. The *Oxford English Dictionary* provides as one historical definition of arbitration: "to act as formal arbitrator or umpire, to mediate (in a dispute between contending parties)." The Statutes of Edward III (1606) referring to what today obviously would be called a commercial *arbitration* panel, provided: "And two Englishmen, two of Lombardie and two of Almaigne shall (be) chosen to be mediators of questions between sellers and buyers."[1]

Modern labor relations statutes tend to perpetuate this confusion. As one commentator has observed:

> Some statutes, referring to a process as "mediation" describe formal hearings, with witnesses testifying under oath and transcripts made, require reports and recommendations for settlement to be made by the neutral within fixed periods, and either state or imply the finality of the "mediator's recommendations." In one statute the neutral third parties are called, interchangeably, mediators, arbitrators and impasse panels.[2]

The Federal Mediation and Conciliation Service (note the absence of "arbitration" in its title) performs a basic arbitration function by maintaining a roster from which the Service can nominate arbitrators to the parties and suggest "certain procedures and guides that [the Service believes] will enhance the acceptability of arbitration."[3]

The National *Mediation* Board (emphasis added) performs important functions in the promotion of arbitration and the selection of arbitrators for the railroad and airline industries.[4]

Libraries also assist in perpetuating the arbitration/mediation definitional charade. Search under "mediation" and you will invariably be referred to "arbitration." In the midst of this confusion—even among congressional draftsmen—it is time to explain the differences between the processes.

The most basic difference between the two is that arbitration involves a *decision* by an intervening third party or "neutral;" mediation does not.

Another way to distinguish the two is by describing the processes in terms of the neutral's mental functions. In arbitration, the neutral employs mostly "left brain" or "rational" mental processes—analytical, mathematical, logical, technical, administrative; in mediation, the neutral employs mostly "right brain" or "creative" mental

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[1] Robins, A GUIDE FOR LABOR MEDIATORS 6 (Honolulu: University Press of Hawaii, 1976).

[2] *Id.*

[3] Elkouri and Elkouri, HOW ARBITRATION WORKS 24 (Washington, D.C.: BNA, 3rd ed. 1973)

[4] *Id.* at 25.

processes—conceptual, intuitive, artistic, holistic, symbolic, emotional.

The arbitrator deals largely with the objective; the mediator, the subjective. The arbitrator is generally a passive functionary who determines right or wrong; the mediator is generally an active functionary who attempts to move the parties to reconciliation and agreement, regardless of who or what is right or wrong.

Because the role of the mediator involves instinctive reactions, intuition, keen interpersonal skills, the ability to perceive subtle psychological and behavioral indicators, in addition to logic and rational thinking, it is much more difficult than the arbitrator's role to perform effectively.[5] It is fair to say that while most mediators can effectively perform the arbitrator's function, the converse is not necessarily true.

Besides these differences the two processes are generally employed to resolve two different types of disputes. Mediation is used where there is a reasonable likelihood that the parties will be able to reach an agreement with the assistance of a neutral. Usually, mediation is used when parties will have an ongoing relationship after resolution of the conflict. Arbitration, on the other hand, is generally appropriate for use when two conditions exist: there is no reasonable likelihood of a negotiated settlement; and there will not be a continuing relationship after resolution.[6]

If the two processes are to be used in sequence, mediation occurs first, and if unsuccessful, resort is made to arbitration.[7] Viewed in terms of the judicial process, arbitration is comparable to a trial and mediation is akin to a judicial settlement conference. They are as different as night and day.[8] The differences can best be understood by discussing them in terms of the processes of arbitration and mediation.

The arbitration process

Arbitration has had a long history in this country, going back to procedures carried over into the Colonies from mercantile England. George Washington put an arbitration clause in his last will and testament to resolve disputes among his heirs. Abraham Lincoln urged lawyers to keep their clients out of court and himself arbitrated a boundary dispute between two farmers. Today, arbitration is being used more broadly for dispute settlement both in labor-management relations and in commerical transactions.

Aside from its well-known use in resolving labor disputes, arbitration is now becoming widely used to settle intercompany disputes in various industries, including textile, construction, life and casualty insurance, canning, livestock, air transport, grain and feed and securities.[9]

Simply defined, arbitration is a process in which a dispute is submitted to a third party or neutral (or sometimes a panel of three arbitrators) to hear arguments, review evidence and render a decision.[10] Court-annexed arbitration, a relatively new development, is a process in which judges refer civil suits to arbitrators to render prompt, non-binding decisions. If a particular decision is not accepted by a losing party, a trial *de novo* may be held in the court system. However, adverse decisions sometimes lead to further negotiation and pre-trial settlement.[11]

The arbitration process, court-annexed or otherwise, normally consists of six stages: initiation, preparation, prehearing conferences, hearing, decisionmaking, and award.

Initiation. The initiation stage of arbitration consists of two sub-stages: initiating the proceeding, and selecting the arbitrator. An arbitration proceeding may be initiated either by: submission; "demand" or "notice;" or, in the case of a court-annexed proceeding, court rule or court order.

A submission must be signed by both parties and is used where there is no previous agreement to arbitrate. It often names the arbitrator (or method of appointment), contains considerable detail regarding the arbitrator's authority, the procedure to be used at the hearing, statement of the matter in dispute, the amount of money in controversy, the remedy sought and other matters.

On the other hand, where the description of a dispute is contained in an agreement and the parties have agreed in advance to arbitrate it, arbitration may be initiated unilaterally by one party serving upon the other a written "demand" or "notice" to arbitrate.

However, even where an agreement contains a "demand" or "notice" arbitration clause, parties sometimes choose also to execute a submission after the dispute has materialized. In the court-annexed situation, a lawsuit is mandatorily referred to an arbitration track and the parties must select an arbitrator from a court-maintained roster or otherwise by mutual agreement.[12]

Several types of tribunals and methods of selecting their membership are available to parties who wish to arbitrate. Parties may choose between the use of a "temporary" or "permanent" arbitrator. They can also choose to have single or multiple arbitrators. Since success of the arbitration process often hinges on the expertise of the tribunal, parties generally select a tribunal whose members possess impartiality, integrity, ability and experience in the field in which the dispute arises. Legal training is often helpful but not indispensable.

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[5] As one American professional mediator put it, the mediator "has no science of navigation, no fund inherited from the experience of others. He is a solitary artist recognizing, at most, a few guiding stars and depending mainly on his personal power of divination." Meyer, *Function of the Mediator in Collective Bargaining*, 13 Indus. & Lab. Rel. Rev. 159 (1960)

[6] In labor relations arbitrations, of course, condition (2) is normally not present. Labor disputes are generally divided into two categories: rights disputes and interest disputes. Disputes as to "rights" involve the interpretation or application of existing laws, agreements or customary practices, disputes as to "interests" involve controversies over the formation of collective agreements or efforts to secure them where no such agreement is yet in existence. Elkouri and Elkouri, *supra* n. 3, at 47.

[7] Because of ethical considerations, the arbitrator and mediator normally are different persons. It should also be noted that mediation is frequently effective when it is attempted, with the concurrence of the parties, during the course of an arbitration with a neutral other than the arbitrator serving as the mediator. Often the unfolding of the opponent's evidence during the course of arbitration leads to a better appreciation of the merits of their respective positions and hence an atmosphere conducive to settlement discussions.

[8] The stark distinction between mediation and arbitration was well made by a professional mediator who became chairman of the New York State Mediation Board: "Mediation and arbitration... have conceptually nothing in common. The one [mediation] involves helping people to decide for themselves, the other involves helping people by deciding for them." Meyer, *supra* n. 5, at 164, as quoted in Gulliver, Disputes and Negotiations, a Cross-cultural Perspective, 210 (New York: Academic Press, 1979)

[9] Cooley, *Arbitration as an Alternative to Federal Litigation in the Seventh Circuit*, Report of the Subcommittee on Alternatives to the Present Federal Court System, Seventh Circuit Ad Hoc Committee to Study the High Cost of Litigation, 2 (July 13, 1978)

[10] *Paths to Justice: Major Public Policy Issues of Dispute Resolution*, Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, Appendix 2 (Washington, D.C.: National Institute for Dispute Resolution, October, 1983).

[11] *Id. See also* Evaluation of Court-Annexed Arbitration in Three Federal District Courts (Washington, D.C.: Federal Judicial Center, 1981).

[12] Cooley, *supra* n. 9, at 4, Elkouri and Elkouri, *supra* n. 3, at 183-86. Domke on Commercial Arbitration. §§14:00-14:05 (Rev. Ed. 1984). Arbitrators, if chosen from a list maintained by an arbitration organization or court-maintained roster, are normally compensated at the daily rate fixed by the organization or the court. Arbitrators selected independently by the parties are compensated at the daily or hourly rate at which they mutually agree. In such cases, the parties equally share the expense of the arbitrator's services.

Information concerning the qualifications of some of the more active arbitrators is contained in the *Directory of Arbitrators*, prepared by the Bureau of National Affairs, Inc., and in *Who's Who* (of arbitrators) published by Prentice-Hall, Inc. Also, the Federal Mediation and Conciliation Service (FMCS), the National Mediation Board (NMB) and the American Arbitration Association (AAA) provide biographical data on arbitrators.[13]

Preparation. The parties must thoroughly prepare cases for arbitration. Obviously, a party must fully understand its own case to communicate effectively to the arbitrator. Depending on the nature of the case, prehearing discovery may be necessary and its permissible extent is usually determined by the arbitrator. The advantages of simplicity and utility of the arbitration mode normally weigh against extensive discovery. During this stage, the parties also enter into fact stipulations where possible.[14]

Ordinarily, most or all of the arbitrator's knowledge and understanding of a case is based upon evidence and arguments presented at the arbitration hearing. However, the arbitrator does have some "preparation" functions. Generally, where no tribunal administrator (such as AAA) is involved, the arbitrator, after accepting the office, designates the time and place of the hearing, by mutual agreement of the parties if possible. The arbitrator also signs an oath, if required in the particular jurisdiction, and determines whether the parties will have representation, legal or otherwise, at the hearing.[15]

Prehearing conferences. Depending on the complexity of the matter involved, the arbitrator may wish to schedule a prehearing conference, which is normally administrative in nature.[16] Briefing schedules, if necessary, are set on motions attacking the validity of claims or of the proceeding. But generally, briefing is minimized to preserve the efficiency of the process. Discussion of the underlying merits of claims or defenses of the parties are avoided during a prehearing conference. *Ex parte* conferences between the arbitrator and a party are not permitted.[17]

Arbitration is a process in which a dispute is submitted to a third party to render a decision.

The hearing. Parties may waive oral hearing and have the controversy determined on the basis of documents only. However, an evidentiary-type hearing in the presence of the arbitrator is deemed imperative in virtually all cases. Since arbitration is a private proceeding, the hearing is not open to the public as a rule but all persons having a direct interest in the case are ordinarily entitled to attend.

A formal written record of the hearing is not always necessary; use of a reporter is the exception rather than the general practice. A party requiring an interpreter has the duty to arrange for one. Witnesses testifying at the hearing may also be required to take an oath if required by law, if ordered by the arbitrator, or on demand of any party.[18]

Opening statements are made orally by each party in a brief, generalized format. They are designed to acquaint the arbitrator with each party's view of what the dispute is about and what the party expects to prove by the evidence. Sometimes an arbitrator requests each party to provide a short written opening statement and issue statement prior to the hearing. Occasionally, a respondent opts for making an opening statement immediately prior to presenting initial evidence.[19]

There is no set order by which parties present their cases in arbitration, although in practice the complaining party normally presents evidence first. The parties may offer any evidence they choose, including personal testimony and affidavits of witnesses. They may be required to produce additional evidence the arbitrator deems necessary to determine the dispute. The arbitrator, when authorized by law, may subpoena witnesses or documents upon his or her own initiative or by request of a party. The arbitrator also decides the relevancy and materiality of all evidence offered. Conformity to legal rules of evidence is unnecessary. The arbitrator has a right to make a physical inspection of premises.[20]

The parties make closing arguments, usually limited in duration. Occasionally, the arbitrator requests post hearing briefs. When this occurs, the parties usually waive oral closing arguments.[21]

Decisionmaking. When the issues are not complex, an arbitrator may render an immediate decision. However, when the evidence presented is voluminous and/or time is needed for the members of an arbitration panel to confer, it might require several weeks to make a decision.

The award is the arbitrator's decision. It may be given orally but is normally written and signed by the arbitrator(s). Awards are normally short, definite, certain and final as to all matters under submission. Occasionally, they are accompanied by a short well-reasoned opinion. The award is usually issued no later than 30 days from the closing date of the hearing. When a party fails to appear, a default award may be entered.[22] Depending on the nature of the award (i.e., binding), it may be judicially enforceable and, to some extent, reviewable. The losing party in a court-annexed arbitration is entitled to trial *de novo* in court.

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[13] Elkouri and Elkouri, *supra* n. 3, at 24-25.

[14] Elkouri and Elkouri, *supra* n. 3, at 197; (for preparation checklist *see* pp. 198-99); Domke, *supra* n. 12, §§24:01 and 27:01.

[15] *Id.*

[16] Some of the matters which might be discussed at a prehearing conference are: whether discovery is needed and, if so, scheduling of same; motions that need to be filed and briefed or orally argued; and the setting of firm oral argument and hearing dates.

[17] Cooley, *supra* n. 9, at 4-5; Elkouri and Elkouri, *supra* n. 3, at 186-90

[18] Cooley, *supra* n. 9, at 5.

[19] Elkouri and Elkouri, *supra* n. 3, at 224-25.

[20] Cooley, *supra* n. 9, at 5; Elkouri and Elkouri, *supra* n. 3, at 223-28.

[21] Elkouri and Elkouri, *supra* n. 3, at 225.

[22] Cooley, *supra* n. 9, at 6.

The mediation process

Mediation is a process in which an impartial intervenor assists the disputants to reach a voluntary settlement of their differences through an agreement that defines their future behavior.[23] The process generally consists of eight stages: initiation, preparation, introduction, problem statement, problem clarification, generation and evaluation of alternatives, selection of alternative(s), and agreement.[24]

Initiation. The mediation process may be initiated in two principal ways: parties submit the matter to a public or private dispute resolution organization or to a private neutral; or the dispute is referred to mediation by court order or rule in a court-annexed mediation program.

In the first instance, counsel for one of the parties or, if unrepresented, the party may contact the neutral organization or individual and the neutral will contact the opposing counsel or party (as the case may be) to see if there is interest in attempting to mediate the dispute.

Preparation. As in arbitration, it is of paramount importance that the parties to a dispute in mediation be as well informed as possible on the background of the dispute, the claims or defenses and the remedies they seek. The parties should seek legal advice if necessary, and although a party's lawyer might attend a typical nonjudicial mediation, he or she normally does not take an adversary role but is rather available to render legal advice as needed.

The mediator should also be well-informed about the parties and the features of their dispute and know something about:

- the balance of power;
- the primary sources of pressure exerted on the parties;
- the pressures motivating them toward agreement as well as pressures blocking agreement;
- the economics of the industry or particular company involved;
- political and personal conflicts within and between the parties;
- the extent of the settlement authority of each of the parties.

In mediation, an impartial intervenor helps the parties reach a voluntary settlement.

The mediator sets the date, time and place for the hearing at everyone's convenience.[25]

Introduction. In the mediation process, the introductory stage may be the most important.[26] It is in that phase, particularly the first joint session, that the mediator establishes his or her acceptability, integrity, credibility and neutrality. The mediator usually has several objectives to achieve initially. They are: establish control of the process; determine issues and positions of the parties; get the agreement-forging process started; and encourage continuation of direct negotiations.[27]

Unlike a judge in a settlement conference or an arbitrator who wields the clout of a decision, a mediator does not, by virtue of position, ordinarily command the parties' immediate trust and respect; the mediator earns them through a carefully orchestrated and delicately executed ritual of rapport-building. Every competent mediator has a personal style. The content of the mediator's opening remarks is generally crucial to establishing rapport with the parties and the respectability of the mediator and the process.

Opening remarks focus on: identifying the mediator and the parties; explaining the procedures to be followed (including caucusing),[28] describing the mediation function (if appropriate) and emphasizing the continued decisionmaking responsibility of the parties; and reinforcing the confidentiality and integrity of the process.[29] When appropriate, the mediator might invoke the community and public interest in having the dispute resolved quickly and emphasize the interests of the constituents in the successful conclusion of the negotiations.[30]

Finally, the mediator must assess the parties' competence to participate in the process. If either party has severe emotional, drinking, drug, or health problems, the mediator may postpone the proceeding. If the parties are extremely hostile and verbally abusive, the mediator must endeavor to calm them, by preliminary caucusing if necessary.[31]

Problem statement. There are essentially two ways to open a discussion of the dispute by the parties: Both parties give their positions and discuss each issue as it is raised; or all the issues are first briefly identified, with detailed exposition of positions reserved until all the issues have been identified. The second procedure is preferred; the first approach often leads to tedious time-consuming rambling about insignificant matters, sometimes causing the parties to become more entrenched in their positions.[32]

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[23] Salem, *Mediation—The Concept and the Process*, in INSTRUCTORS MANUAL FOR TEACHING CRITICAL ISSUES (1984, unpublished). *See generally* Simkin, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 25 (BNA, 1971). Court-annexed mediation is a process in which judges refer civil cases to a neutral (mediator or master) for settlement purposes. It also includes in-court programs in which judges perform the settlement function full-time

[24] *See generally* Ray, *The Alternative Dispute Resolution Movement*, 8 PEACE AND CHANGE 117 (Summer 1982). The process of mediation and the roles and strategies of mediators have been generally neglected in studies of negotiation. As one author remarked, "Mediation still remains a poorly understood process." Gulliver, *supra* n. 8

[25] Meagher, "Mediation Procedures and Techniques," 18-19 (unpublished paper on file in the Office of the General Counsel, FMCS, Washington, D.C.). Mr. Meagher is a former commissioner of FMCS.

[26] The success of the introductory stage is directly related to two critical factors: (1) the appropriate timing of the mediator's intervention, and (2) the opportunity for mediator preparation. A mediator's sense of timing is the ability to judge the psychological readiness of an individual or group to respond in the desired way to a particular idea, suggestion or proposal. Meagher, *supra* n. 25, at 5, *see also* Maggiolo, TECHNIQUES OF MEDIATION IN LABOR DISPUTES 62 (Dobbs Ferry, NY: Oceana Publications, 1971). The kinds of preparatory information needed by the mediator are discussed in the text *supra*. In many instances, such information is not available prior to intervention and thus it must be delicately elicited by the mediator during the introductory stage.

[27] Meagher, *supra* n. 25, at 26-27. Wall, *Mediation, An Analysis, Review and Proposed Research*, 25 J. CONFLICT RES. 157, 161 (1981).

[28] Caucusing is an *ex parte* conference between a mediator and a party

[29] Meagher, *supra* n. 25, at 28; Maggiolo, *supra* n. 26, at 42-44

[30] *Id.*

[31] Ray, *supra* n. 24, at 121; Maggiolo, *supra* n. 26, at 52-54.

Generally, the complaining party tells his or her "story" first. It may be the first time that the adverse party has heard the full basis for the complaint. The mediator actively and empathically listens, taking notes if helpful, using listening techniques such as restatement, echo and non-verbal responses. Listening is the mediator's most important dispute-resolving tool.[33]

The mediator also:

- asks open-ended and closed-ended questions at the appropriate time and in a neutral fashion;
- obtains important "signals" from the behavior and body movements of the parties;
- calms a party, as necessary;
- clarifies the narration by focused questions;
- objectively summarizes the first party's story;
- defuses tensions by omitting disparaging comments from the summary;
- determines whether the second party understands the first party's story;
- thanks the first party for his or her contribution.

The process is repeated with the second party.[34]

Problem clarification. It is in this stage that the mediator culls out the true underlying issues in the dispute. Often the parties to a dispute intentionally obfuscate the core issues. The mediator pierces this cloud-cover through separate caucuses in which he or she asks direct, probing questions to elicit information which one party would not disclose in the presence of the other party. In a subsequent joint session, the mediator summarizes areas of agreement or disagreement, being careful not to disclose matters which the parties shared with the mediator in confidence. They are assisted in grouping and prioritizing issues and demands.[35]

The arbitrator's function is quasi-judicial in nature.

Generation and evaluation of alternatives. In this stage, the mediator employs two fundamental principles of effective mediation: creating doubt in the minds of the parties as to the validity of their positions on issues; and suggesting alternative approaches which may facilitate agreement.[36] These are two functions which parties to a dispute are very often unable to perform by themselves. To carry out these functions, the mediator has the parties separately "brainstorm" to produce alternatives or options; discusses the workability of each option; encourages the parties by noting the probability of success, where appropriate; suggests alternatives not raised by the parties and then repeats the three previous steps.[37]

Selection of alternative(s). The mediator may compliment the parties on their progress and use humor, when appropriate, to relieve tensions; assist the parties in eliminating the unworkable options; and help the parties determine which of the remaining workable solutions will produce the optimum results with which each can live.[38]

Agreement. Before the mediation is terminated, the mediator summarizes and clarifies, as necessary, the terms of the agreement reached and secures the assent of each party to those terms; sets a follow-up date, if necessary; and congratulates the parties on their reasonableness.

The mediator does not usually become involved in drafting a settlement agreement. This task is left to the parties themselves or their counsel. The agreement is the parties', not the mediator's.[39]

A mediator's patience, flexibility and creativity throughout this entire process are necessary keys to a successful resolution.

The "neutral's" functions

To fully appreciate the differences (or the similarities) between the two processes, and to evaluate the appropriate use of either process, it is instructive to focus on considerations which exist at their interface—the function and power of the "neutral." This is a particularly important exercise to acquire a realistic expectation of the result to be obtained from each process.

The arbitrator's function is quasi-judicial in nature and, because of this, an arbitrator is generally exempt from civil liability for failure to exercise care or skill in performing the arbitral function.[40] As a quasi-judicial officer, the arbitrator is guided by ethical norms in the performance of duties. For example, an arbitrator must refrain from having any private (*ex parte*) consultations with a party or with an attorney representing a party without the consent of the opposing party or counsel.[41]

Moreover, unless the parties agree otherwise, the arbitration proceedings are private and arbitrators must take appropriate measures to maintain the confidentiality of the proceedings.[42] It has generally been held that an arbitrator may not testify as to the meaning and construction of the written award.[43]

In contrast, a mediator is not normally considered to be quasi-judicial, unless he or she is appointed by the court as, for example, a special master. Some courts have extended the doctrine of immunity to persons termed "quasi-arbitrators"—persons empowered by agreement of the parties to resolve disputes arising be-

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[32] Meagher, *supra* n. 25, at 30; Maggiolo, *supra* n. 26, at 47.

[33] Ray, *supra* n. 24, at 121; Salem, *supra* n. 23, at 4-5; Robins, *supra* n. 1, at 27; Maggiolo, *supra* n. 26, at 48-49.

[34] Ray, *supra* n. 24, at 121.

[35] *Id.* at 121-22; Meagher, *supra* n. 25, at 57-58; Robins, *supra* n. 1, at 43-44; Maggiolo, *supra* n. 26, at 49-50.

[36] Maggiolo, *supra* n. 26, at 12. Other basic negotiation principles which some mediators use to advantage throughout the mediation process are found in Fisher and Ury, GETTING TO YES, (New York: Penguin Books, 1983. Those principles are: (1) separate the people from the problem; (2) focus on interests, not positions; (3) invent options of mutual gain; (4) insist on using objective criteria.

[37] Ray, *supra* n. 24, at 122. Meagher, *supra* n. 25, at 48-49, describes additional techniques of "planting seeds," "conditioning," and "influencing expectations."

[38] Ray, *supra* n. 24, at 122.

[39] *Id.*

[40] Domke, *supra* n. 12, §23:01, at 351-53.

[41] *Id.* §24:05, at 380.

[42] *Id.*

[43] *Id.* §23:02, at 355.

A mediator has little systemic-based power.

tween them.[44] Although the law is far from clear on this point, a very persuasive argument may be advanced that mediators are generally immune from lawsuits relating to the performance of their mediation duties where the agreement under which they perform contains a hold-harmless provision or its equivalent.

In absence of such contractual provision, it would appear that a functionary such as a mediator, selected by parties to perform skilled or professional services, would not ordinarily be immune from charges of negligence but rather is required to work with the same skill and care exercised by an average person engaged in the trade or profession involved.[45]

Of course, weighing heavily against a finding of negligence on the part of a mediator is the intrinsic nature, if not the essence, of the mediation process which invests the parties with the complete power over their destiny; it also guarantees any party the right to withdraw from the process and even to eject the mediator during any pre-agreement stage.[46]

Also, in contrast to arbitrators, certain ethical restrictions do not apply to mediators. Mediators are permitted to have *ex parte* conferences with the parties or counsel. Indeed, such caucuses, as they are called, are the mediator's stock-in-trade. Furthermore, while one of the principal advantages of a privately-conducted mediation is the non-public or confidential nature of the proceedings, and although Rule 408 of the Federal Rules of Evidence and public policy considerations argue in favor of confidentiality, the current state of the law does not provide a guarantee of such confidentiality.[47] However, in most cases a strong argument can be made that the injury from disclosure of a confidential settlement proceeding is greater than the benefit to be gained by the public from nondisclosure.[48]

Finally, unlike the arbitrator, the performance of whose function may be enhanced by knowledge, skill, or ability in a particular field or industry, the mediator need not be an expert in the field which encompasses the subject of the dispute. Expertise may, in fact, be a handicap, if the parties look wrongly to the mediator as an advice-giver or adjudicator.[49]

Comparative power

The arbitrator derives power from many sources. The person may be highly respected in a particular field of expertise or widely renowned for fairness. But aside from these attributes which emanate from personal talents or characteristics, the arbitrator operates within a procedural and enforcement framework which affords considerable power, at least from the perspective of the disputants. Under certain circumstances, arbitrators may possess broad remedy powers, including the power, though rare, to grant injunctive relief.[50] They normally have subpoena power, and generally they have no obligation to anyone, not even "to the court to give reasons for an award."[51]

In general, a valid arbitration award constitutes a full and final adjustment of the controversy.[52] It has all the force and effect of an adjudication, and effectively precludes the parties from again litigating the same subject.[53] The award can be challenged in court only on very narrow grounds. In some states the grounds relate to partiality of the arbitrator or to misconduct in the proceedings, such as refusal to allow the production of evidence or to grant postponements, as well as to other misbehavior in conducting the hearings so as to prejudice the interests of a party.[54]

A further ground for challenge in some states is the failure of the arbitrator to observe the limits of authority as fixed by the parties' agreement—such as determining unsubmitted matters or by not dealing definitely and finally with submitted issues.[55] In Illinois, as in most states, a judgment entered on an arbitration award is enforceable "as any other judgment."[56] Thus, from a systemic perspective, the arbitrator is invested with a substantial amount of power.

In striking contrast, with the exception of a special master appointed by the court or a neutral appointed by some governmental body, the mediator has little if any systemic-based power. Most if not all of a mediator's power is derived from experience, demonstrated skills and abilities, and a reputation for successful settlements.

Any particular mediator may wield power by adopting a particular role on what might be described as a continuum representing the range of strengths of intervention: from virtual passivity, to

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[44] See Craviolini v. Scholer & Fuller Associated Architects, 89 Ariz. 24, 357 P.2d 611 (1960), where an architect was deemed to be a "quasi-arbitrator" under an agreement with the parties and therefore entitled to immunity from civil liability in an action brought against him by either party in relation to the architect's dispute-resolving function. *Compare* Gammell v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364 (1955), where certified public accountants, selected for the specific purpose of making an examination and of auditing the books of a corporation to ascertain its earnings, were held not to have acquired the status of arbitrators so as to create immunity for their actions in the performance of such service, simply because the report was to be binding upon the parties.

[45] Domke, *supra* n. 12, §23:01, at 352-53.

[46] As two professional mediators have poignantly commented: "Unlike arbitration and other means of adjudication, the parties retain complete control...If they do not like the mediator, they get another one. If they fail to produce results, they may end the mediation at any time." Phillips and Piazza, *How to Use Mediation*, 10 A.B.A. J. of Sect. of Lit. 31 (Spring, 1984).

[47] *See* Grumman Aerospace Corp. v. Titanium Metals Corp., 91 F.R.D. 84 (E.D. N.Y. 1981) (Court granted a motion to enforce a subpoena *duces tecum* involving a report prepared by a neutral fact-finder on the effects of certain price-fixing activities). *See generally* Restivo and Mangus, *Alternative Dispute Resolution: Confidential Problem-Solving or Every Man's Evidence? Alternatives to the High Cost of Litigation*, 2 Law & Bus. Inc./Ctr. for Public Resources, 5 (May, 1984). Parties can assist the preservation of confidentiality of their mediation proceedings by reducing to writing any expectations or understanding regarding the confidentiality of the proceedings and by being careful to protect against unnecessary disclosure both within their respective constituencies and the outside world, *id.* at 9.

[48] *See, e.g.*, NLRB v. Joseph Macaluso, 618 F.2d 51 (9th Cir. 1980); Pipefitters Local 208 v. Mechanical Contractors Assn. of Colorado, 90 Lab. Cas. (CCH) ¶ 12,647 (D. Colo. 1980).

[49] Phillips and Piazza, *supra* n. 46, at 33.

[50] In re Ruppert, 29 LA 775, 777 (N.Y. Ct. App. 1958); In re Griffin, 42 LA 511 (N.Y. Sup. Ct. 1964). *See generally* Elkouri and Elkouri, *supra* n. 3, at 241-51.

[51] Domke, *supra* n. 12, §29:06, at 436.

[52] Donoghue v. Kohlmeyer & Co., 63 Ill. App. 3d 979, 380 N.E.2d 1003, 20 Ill. Dec. 794 (1978).

[53] Borg, Inc. v. Morris Middle School Dist. No. 54, 3 Ill. App. 3d 913, 278 N.E.2d 818 (1972).

[54] Domke, *supra* n. 12, §33:00, 463.

[55] *Id.* In Illinois, the court's power to vacate or modify arbitration awards is narrowly circumscribed. *See* Ill. Rev. Stat. ch. 10, ¶¶ 112, 113 (1981).

[56] Ill. Rev. Stat. ch. 10, ¶114 (1981).

"chairman," to "enunciator," to "prompter," to "leader," to virtual arbitrator.[57] The mediator who can adopt different roles on this continuum, changing strategies to fit changing circumstances and requirements of both the disputants and himself, is inevitably more effective in accumulating and wielding power which is real, yet often not consciously perceptible by the disputants themselves.[58]

Table 1: A comparison of arbitration/mediation processes

Arbitration	Mediation
1. Initiation Submission Demand or notice Court rule or order Selection of arbitrator	**1. Initiation** Submission Court rule or order Assignment or selection of mediator
2. Preparation Discovery Prehearing conference Motions Stipulations Arbitrator's oath Arbitrator's administrative duties Arbitrator does not seek out information about parties or dispute	**2. Preparation** Usually, no discovery Parties obtain background information on claims, defenses, remedies Mediator obtains information on parties and history of dispute Usually, no mediator oath
3. Prehearing conference Administrative Scheduling No discussion of underlying merits of claims or defenses No *ex parte* conferences	**3. Introduction** Mediator Conducts *ex parte* conferences, if necessary, for calming Gives opening descriptive remarks Develops trust and respect Emphasizes importance of successful negotiations Helps parties separate the people from the problem
4. Hearing Not generally open to public Written record optional Witnesses and parties testify under oath **Opening statement** Made orally Sometimes also in writing **Order of proceedings and evidence** Complaining party usually presents evidence first Arbitrator may subpoena witnesses Evidence rules relaxed Arbitrator rules on objections to evidence, may reject evidence **Closing arguments** Oral arguments normally permitted for clarification and synthesis Post-hearing briefs sometimes permitted	**4. Problem statement** Confidential proceeding, no written record Parties do not speak under oath Issues identified Issues discussed separately; stories told Mediator listens takes notes Mediator asks questions, reads behavioral signals Mediator calms parties, summarizes stories, defuses tensions Mediator determines whether parties understand stories Mediator usually has no subpoena power **5. Problem clarification** Mediator Culls out core issues in caucus Asks direct, probing questions Summarizes areas of agreement and disagreement Assists parties in grouping and prioritizing issues and demands Helps parties focus on interests, not positions
5. Decisionmaking If issues non–complex, arbitrator can issue an immediate decision If issues complex, or panel has three members, extra time may be required	**6. Generation and evaluation of alternatives** Mediator Creates doubts in parties' minds as to validity of their positions Invents options for facilitating agreement Leads "brainstorming," discusses workability notes probability of success of options **7. Selection of alternative(s)** Mediator Compliments parties on progress Assists parties in eliminating unworkable options Helps parties to use objective criteria Helps parties determine which solution will produce optimum results
6. Award Normally in writing, signed by arbitrator(s) Short definite certain and final, as to all matters under submission Occasionally a short opinion accompanies award Award may be judicially enforceable or reviewable	**8. Agreement** Mediator Summarizes and clarifies agreement terms Sets follow-up date if appropriate Congratulates parties on their reasonableness Usually does not draft or assist in drafting agreement Agreement is enforceable as a contract and subject to later modification by agreement

Since, in the ordinary case, the result of the mediation process is an agreement or contract not reduced to a court judgment,[59] the result is binding on the parties only to the extent that the law of contracts in the particular jurisdiction requires. And to the same extent, the result is enforceable by one party against another. As a practical matter, where a party breaches an agreement or contract which is the product of mediation and the agreement is not salvageable, prudence would seem to dictate that in most cases the underlying dispute—and not the breach of agreement—should be litigated.

Summary

It is clear that both the functions and the levels of power of the arbitrators and mediators are dramatically different. Counsel must assess the nature of the dispute and the personalities of the disputants prior to determining which process, arbitration or mediation, has the best chance to achieve a successful resolution of the particular conflict.

For example, arbitration would probably prove to be the better dispute resolution choice where the dispute involves highly technical matters; a long-standing feud between the disputants; irrational and high-strung personalities; and no necessity of a continued relationship after resolution of the conflict.

On the other hand, mediation may prove to be the most effective choice where disputants are stubborn but basically sensible; have much to gain from a continued relationship with one another; and conflict resolution is time-critical.

Arbitration and mediation are two separate and distinct processes having a similar overall goal (terminating a dispute), while using totally different methods to obtain dissimilar (decisional vs. contractual) results. These differences are best understood by viewing the processes side-by-side in Table 1.

The benefits of arbitration and mediation to litigants, in terms of cost and time savings, are just beginning to be recognized by lawyers and business professionals alike. It is hoped that this discussion of the arbitration and mediation processes and their differences will help lawyers feel more comfortable with these two methods of dispute resolution and to use them to their clients' advantage in their joint pursuit of swift, inexpensive, simple justice. ☐

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[57] Gulliver, *supra* n. 8, at 220.

[58] *Id.* at 226.

[59] Where a settlement agreement is reduced to a judgment, for example, through intervention and assistance of a special master, the "consent judgment" is generally enforceable, if necessary, before the court in which the consent judgment is entered

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Three case studies of mediated negotiation in the public sector are summarized. Special attention is given to the roles played by the mediators in these cases, the difficulties of ensuring adequate representation of all stakeholders, and the problems of protecting the "public interest." Criteria for evaluating mediated negotiation as a supplement to traditional legislative, administrative, and judicial means of resolving resource allocation disputes are offered. The techniques of labor mediation and mediation in international disputes are compared to see which are more appropriate for use in public sector resource allocation disputes.

Mediated Negotiation* in the Public Sector

Mediator Accountability and the Public Interest Problem

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Elected officials and administrators in the public sector, confronted with increasingly complex choices, must make resource allocation decisions that take into account the competing claims of individuals and groups. In the search for more efficient and effective means of handling these adjudicatory responsibilities, mediated negotiation is being tried more and more frequently. While Americans are quite familiar with the way mediation has been used in collective bargaining and labor relations, for the most part they are unaware of the extent to which mediated negotiation is now being used to resolve family disputes, community disputes, environmental disputes, intergovernmental disputes, and, more recently, scientific controversies and state budget battles.

The list of cases in which mediated negotiation has been used to supplement traditional administrative, legislative, and judicial decision-

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**The term "mediated negotiation" rather than "mediation" is used in order to emphasize the presence of a neutral intervenor and to distinguish mediated negotiation from other consensual approaches to dispute resolution that employ the assistance of a third party.*

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making is growing steadily (Goldmann, 1980; Talbot, 1983; and Susskind et al., forthcoming). Mediated negotiation was used in Connecticut to decide on the distribution of federal block grant funds for social service programs (Watts, 1983). Several federal agencies, including the Environmental Protection Agency, have experimented with mediation in the rule-making process (Baldwin, 1983). Mediation was used to resolve a crisis in the funding of the state unemployment compensation fund in Wisconsin (Bellman and Sachs, 1983), to resolve water policy disputes in the Denver area and elsewhere (Kennedy and Lansford, 1983; Folk-Williams, 1982), and to handle a variety of complicated cases that the federal district court thought might be resolved more expeditiously by a court-appointed mediator (Goldberg, 1983). Dozens of land use and facility-siting disputes have been resolved through face-to-face negotiation assisted by a "neutral third party," (Susskind, 1981; Bacow and Wheeler, forthcoming). Indeed, several states have incorporated mediated negotiation into the process of siting hazardous waste treatment facilities (Bacow, 1982). These and other instances of mediated negotiation in the public sector go far beyond the processing of interpersonal disputes between neighbors (Alper and Nichols, 1981), husbands and wives (Haynes, 1981), and the more traditional mediation of disputes between labor and management (Simkin, 1971).

Mediated negotiation is attractive because it addresses many of the procedural weaknesses of conventional dispute resolution mechanisms; that is, it allows for more direct involvement of those most affected by decisions than do most administrative and legislative processes; it produces results more rapidly and at lower cost than do courts; and it is flexible and therefore more adaptable to the specific needs of the parties in a given situation.

Mediated negotiation depends on the assistance of a nonpartisan facilitator. In practice, the roles played by mediators vary tremendously from situation to situation. At a minimum, the prototype mediator arranges meetings, assists in the exchange of information, tenders proposals at the request of one party or another, and assists the parties in developing clearer statements of their interests. Mediators also can propose possible settlements that parties themselves would accept but not put forward for fear of appearing "soft." Mediators involved thus far in mediated negotiation in the public sector have come from various backgrounds and have very different operating styles. Most, however, look to collective bargaining (labor mediation) for their cues, although this well may be inappropriate, as we will explore further on.

Public sector disputes are special. They differ from conventional two-party private disputes in that they involve choices with substantial spillover effects or externalities that often fall most directly on diffuse, inarticulate, and hard-to-represent groups (such as future generations). It is our contention that mediators involved in resource allocation decisions in the public sector have responsibilities that transcend those facing mediators in more traditional situations. While the record thus far is impressive, it is important to ask whether mediation is as responsive to the broader public interest as are traditional dispute resolution and resource allocation mechanisms. The key question is whether mediators are as accountable to those most affected by their actions as are elected and appointed officials.

In this article we will (1) review some examples of mediated negotiation in the public sector; (2) analyze the process of mediation involved in these cases in an effort to draw some general conclusions; (3) examine measures of success appropriate to judge the outcome of mediated negotiation efforts; (4) analyze the responsibilities of the mediator in public sector resource allocation disputes; (5) assess the relative usefulness of various mediation models and strategies insofar as they apply to public sector mediation; and (6) specify the critical barriers to more widespread use of mediated negotiation in the public sector.

AN INTRODUCTION TO MEDIATED NEGOTIATION IN THE PUBLIC SECTOR

We begin with a review of three cases involving the use of mediated negotiation. Each case summary includes a brief chronology of events, an analysis of the mediator's role, and an assessment of the outcome of the negotiation.

THE FOOTHILLS CASE

The Foothills case was sparked by a proposal in the 1970s to construct a water treatment facility, dam, and reservoir on the South Platte River near Denver, Colorado (Burgess, forthcoming). The U. S. Army Corps of Engineers, the Environmental Protection Agency (EPA), the Bureau of Land Management, the Denver Water Board, and numerous environmental action groups stubbornly debated the merits of the proposal, its projected impacts on urban sprawl, air pollution, and on Waterton Canyon, a valuable wildlife and recreation area.

Congressional Representative Pat Schroeder offered to mediate the case but was rebuffed by the Denver Water Board, one of the project's supporters. When Congressman Tim Wirth, however, a well-known environmental advocate who appeared to favor some version of the proposed facility, volunteered to serve as mediator, all the parties agreed to negotiate.

Wirth arranged a series of joint meetings with the Corps, EPA, and the Denver Water Board. As soon as these three groups agreed to the terms of a basic settlement, a coaliton of environmentalists was consulted. They objected to only a few points in the proposed settlement, and a final agreement was reached with only minor alterations. Although construction of the dam constituted a major concession on the part of the environmentalists and EPA, the parties felt that sufficient compensation and steps to mitigate adverse impacts had been promised.

Congressman Wirth's acceptance as a mediator was particularly noteworthy because of his public stand on the issues in dispute. His position allowed him to bring both subtle and direct pressure to bear on the negotiating parties. He had enough political clout that the federal agencies involved felt he might "cause problems for them" if they did not make concessions. The local organizations and actors involved believed he represented their best interests, although, officially, Wirth was accountable only to the voters in his congressional district. From our standpoint, he appeared at times to demonstrate little concern for interest groups not represented directly at the bargaining table.

Although the participating parties supported the negotiated settlement, in retrospect the negotiation process appears flawed. First, Wirth's decision to bring local environmental groups into the dialogue only after the basic agreement had been drafted by the key governmental agencies caused difficulties in implementing the agreement. A discontented faction of the environmental coalition later contested the settlement in court. Second, the reduced capacity of the negotiated water facility could cause severe water shortages in the Denver area in the future. Ratepayers and future homeowners will be stuck with the costs of expanding the water system (probably at a higher price) sometime in the future. Their interests were not well represented in the negotiation.

In the eyes of the federal, state, and local agencies involved in the Foothills dispute, the mediation effort spearheaded by Wirth appeared to preempt some of their powers and duties. The court judge who presided over the Foothills case trial objected strenuously to the fact that the parties were engaged in an informal negotiation outside the courtroom. From the standpoint of the parties involved, however, an agreement was reached that exceeded what they thought they might achieve in court; or, at least they achieved with certainty results that they had only a small chance of gaining in court.

Mediated negotiation does not, in fact, preempt the statutory powers of elected and appointed officials. They can choose whether to participate in the negotiations. They can agree whether to be bound by the agreements reached. Eventually, they must grant the necessary permits, licenses, or permissions under the rules and procedures prescribed by law. Mediated negotiation does, however, create a clearly stated public consensus that is difficult for elected and appointed officials to ignore.

In the Foothills case, the key agencies and interest groups informally reached a negotiated settlement that was later ratified through the formal regulatory (permitting) process. No group's legal rights were abridged. While there were legitimate stakeholding interests (albeit hard to represent), whose interests were probably not well served, the mediator used his elected position to force some of the reluctant parties to the negotiating table. He did not, however, use his position to ensure that all the stakeholding interests were represented (nor did he claim to represent the public interest himself).

BRAYTON POINT CASE

Acting under authority granted by the Energy Supply and Environmental Coordination Act (ESECA) of 1974, the Department of Energy notified the New England Power Company (NEPCO) that it would be required to burn coal instead of oil in three units of its electricity generating plant in Somerset, Massachusetts (Smith, forthcoming). NEPCO contested EPA's estimates of the cost of conversion and the steps required to meet air pollution standards. It appeared that prospects for a conversion at the Brayton Point plant that would satisfy all affected parties (i.e., NEPCO, federal and state regulatory agencies, and energy consumers) were poor. Not only were the relationships among the parties uncertain, but the ESECA program itself was new and its policies ambiguous.

In April 1977, the Center for Energy Policy, a nonprofit organization, persuaded the principal parties to accept the services of a mediator and arranged a meeting attended by officials of NEPCO, DOE, EPA, and the Massachusetts Department of Environmental Quality Engineering (DEQE) to explore the possibilities for coal conversion. Although agreeing to participate in the mediated negotiation process, DOE continued to pursue the conversion through formal regulatory channels. (The formal conversion process entailed the issuance of a prohibition order, the preparation of an EIS, and cooperation with EPA in obtaining certification under the State Implementation Plan, as stipulated by the Clean Air Act.) Eleven months later, agreement was reached on all issues.

The final agreement allowed for a phased-in conversion plan at Brayton Point, set limits on the sulfur content of the coal to be burned, and indicated special particulate standards for the facility.

David O'Connor from the Center for Energy Policy served as mediator in the Brayton Point case. He assumed an active role in formulating and negotiating the settlement. His activities can be grouped under five headings.

O'Connor served first as an organizer of the negotiations. He sought approval of informal ground rules for setting the agenda, raising issues, making proposals, dealing with the press, documenting discussions, and formulating agreements. He chaired the meetings, kept written records of the discussions, and documented points of consensus.

Second, he served as an information resource. He helped to explain technical and legal matters to all the parties, ensuring that their understanding of the situation was accurate.

Third, he acted as a source of encouragement, emphasizing the progress being made by the group throughout the negotiations. This provided an important psychological boost and helped to sustain the momentum of the meetings.

Fourth, O'Connor played the role of confidential advisor. He held private meetings with individual parties to help them clarify their understanding of their own interests and allowed them to articulate new positions and proposals in a nonthreatening and risk-free environment.

Finally, through these private interactions, he sought to comprehend the groups' priorities and to understand the central technical factors on which positions turned. From this standpoint, he was able to develop and present composite ideas and options to the groups.

All participating parties expressed satisfaction with the negotiated agreement. DOE, in particular, saw great advantage in gaining voluntary conversion. Although the negotiation did not include representatives of consumer groups, environmentalists, or other public interest groups, additional procedures (i.e., public hearings) required under formal regulatory rules were used to supplement the negotiation process in order to obtain the concurrence and support of unrepresented parties.

While an attempt was made to ensure that the concerns of all affected groups would be heard and presumably incorporated into the ultimate conversion plan, the negotiated agreement could be criticized for neglecting to consider the interests of residents living in areas adjoining the plant. Moreover, while local residents might be satisfied with the phased-in conversion plan, distant portions of the Northeast, susceptible to increased sulfate effluents and acid rain, were offered no direct involvement in the negotiation.

In the eyes of the key participants in the Brayton Point case, the mediated negotiation effort was a success. The parties achieved a voluntary agreement that satisfied all their interests. Not unlike a labor mediator, O'Connor measured his success in terms of the satisfaction with the final agreement expressed by the parties at the negotiation table. While he ensured that all sides based their positions on scientifically accurate interpretations of the coal conversion process, he did not press the participants to address the broader representation issue. One could argue that the state and federal agency officials involved in the negotiation had an obligation to represent the interests of the broader public and that through the elected officials to whom they reported, they were indirectly accountable to the public at large. This seems, though, to be a rather weak argument.

THE CONNECTICUT NEGOTIATED INVESTMENT STRATEGY

The Connecticut Negotiated Investment Strategy (NIS) was aimed at developing a strategy for distributing $33 million of federal aid in the form of a Social Services Block Grant (SSBG) received by the state of Connecticut for fiscal year 1984. Initiated by the Governor's office, 18 state agencies, 114 municipalities, and numerous private service agencies participated in a mediated negotiation (Watts, 1983).

Three teams, representing the 18 state agencies, the municipalities, and the nonprofit public service providers, convened formally in five joint sessions held from October to December 1982. Prior to the negotiating sessions, representatives from the teams met to select a mediator. Training sessions were held to educate the participants about the NIS process and negotiating techniques. Ground rules for the negotiations were established by the participants.

The negotiating sessions involved debating and revising a written statement prepared ahead of time by the participants. They addressed an agenda of issues determined jointly at the first formal meeting. At the fourth full session (held on December 7, 1982), the mediator presented a draft agreement he had prepared by incorporating items of agreement generated during previous discussions. This helped the group narrow the discussion sufficiently to bring the process to a conclusion. A final agreement was reached in a specially scheduled session on December 23, 1982.

The final agreement outlined a process for distributing the SSBG funds and established a Tripartite Commission to monitor the implementation of the agreement, resolve outstanding issues, and serve as interpreter of the agreement in future disputes.

Josh Stulberg, a lawyer and trained mediator, was selected by the negotiating teams to serve as the mediator. The ground rules established by the teams specified a rather passive role for the mediator. His job was to facilitate the negotiating process by designating official observers for the joint sessions, preparing minutes of all joint sessions, coordinating meeting schedules, developing agendas, controlling the pace of the bargaining sessions, and assisting the teams in writing formal statements. Stulberg made little effort to rectify rather obvious power imbalances among the teams. Stulberg, furthermore, made no attempt to clarify technical issues, although the state agencies' representatives apparently had a much more thorough grasp than others of the complicated financial maneuverings that were being proposed.

The document produced through the NIS process and ultimately approved by the governor and the state legislature has been described as "a summary statement of all the teams' positions rather than a collaborative effort to maximize joint gains" (Watts, 1983: 39). The agreement was lacking, it seems, in several important respects: (1) The language of the agreement was ambiguous in numerous places, portending disputes involving interpretation of the document in the future. (2) Incentives and mechanisms to ensure compliance with the agreement were specifically neglected. (3) No timetable for implementation of the agreement was specified. (4) The mediator was not assigned (and did not independently assume) any responsibility for the monitoring of the final agreement.

The Connecticut SSBG allocation for FY 1984 represented a substantial reduction in the level of federal aid available to address crucial human service needs. The allocation criteria and plan developed through the NIS process clearly will affect the entire population of the state since it stipulates how some of the state's own revenues will be spent to match the federal allocation. Should decisions like these be made through an informal negotiation process? While the governor and the legislature had to approve the NIS proposal, to fail to do so after such an elaborate effort produced consensus would have thrown the entire budgetary process into turmoil.

A few key interest groups were not involved directly in the Connecticut negotiations, most notably certain human service consumers. Conceivably, the state agency administrators or local elected officials on the teams could have claimed to represent these groups, but they did not. The mediator in this case made no special effort to take account of the externalities, or the spillover effects, of the agreements reached. He did not raise the issue of representation with the teams once they had been selected. He made little or no effort to respond to obvious imbalances in the technical sophistication of the teams. In short, he behaved in a manner quite consistent with the traditional role of a labor mediator. He assumed a rather passive posture, let the parties at the table make the agreement their own, stayed out of the substance of the debate, and took no positions.

MEASURING SUCCESS

Any evaluation of a dispute resolution effort must consider the fairness efficiency, and stability of the *outcome* as well as the *process*. Moreover, an assessment of any method of dispute resolution would be incomplete without a comparison of the outcome to other possible outcomes likely to result from other available methods.

At least six criteria have been suggested by which to judge the success of mediation efforts in the public sector:

(1) The negotiated agreement should be readily acceptable to the parties involved.
(2) The results must appear fair to the community.
(3) The results should maximize joint gains (as judged by a disinterested observer).
(4) The results should take past precedents into consideration.

(5) An agreement should be reached with a minimal expenditure of time and money.
(6) The process should improve rather than aggravate the relationships between or among the disputing parties (Fisher, 1979).

In the Foothills case, while the agreement was acceptable to the parties directly involved, some groups affected but not involved directly in the negotiation were not pleased with either the outcome or the process. While the results appeared fair to the community at large *at the time of the agreement*, there is some question as to whether or not the consensus will hold as economic and ecological conditions change. The agreement took a great deal of time to hammer out, but the expenses were less than what it probably would have cost to pursue all the legal opportunities to appeal. Communications among the parties were improved somewhat—they learned how to talk to each other—but it is not clear whether underlying relationships improved at all. With regard to precedents, there were few to take into account. Whether or not joint gains were maximized is a matter of some dispute—some observers felt that the environmentalists gave away too much.

In the Brayton Point case, the agreement was acceptable to the key parties involved, although, again, some groups obviously affected had only the most indirect opportunity to shape the terms of agreement. No special attempt was made to publicize the terms of the settlement so it is hard to judge whether the results were deemed fair in the eyes of the community at large. The agreement was readily acceptable to the parties at the table. The way they dealt with their differences certainly improved relationships among the key actors. It is doubtful, though, that a precedent was established, since so many situational factors were crucial and probably will never occur that way again. Most observers feel that the agreement did maximize the possible joint gains to the parties at the table, but clearly some interests were not attended to in the negotiations.

The Connecticut NIS agreement was acceptable to the parties directly involved, although some concern was expressed by members of the Hispanic community who felt they were not adequately represented. Relationships otherwise were definitely improved. The time and money spent were, in total, probably more than what would have been consumed if the state agencies only were involved. However, a unilateral decision by the state probably would have created substantial political backlash and subsequent instability that would need to be calculated into the net costs. Some observers feel the NIS negotiators in

Connecticut sidestepped some of the toughest allocation decisions by turning responsibility for detailed decisions over to the new Tripartite Committee.

If the mediated negotiation process undertaken in the three cases described here were compared with the typical administrative, judicial, or legislative processes used to resolve such conflicts (or competing claims), we would likely find that the outcome and the process of mediation appeared fairer and more efficient to most of the parties involved and produced more stable agreements. It is hard, though, to generate convincing comparative data without artificially created experiments. Moreover, it is important to point out that mediated negotiation is typically a *supplement to* rather than a replacement for the more traditional mechanisms for resolving resource allocation disputes. In this sense, an "either-or" comparison is not really appropriate.

In our American representative democracy, citizens are given the opportunity to affect the decisions of legislative bodies through lobbying and voting. Given the general level of (in)accessibility of most levels of government, lobbying is commonly an option reserved only for the most highly organized and (financially) resourceful groups.

The vote is the most dominant instrument by which individuals may register their concerns; however, it is inadequate in three significant ways. First, our system of "majority rule" in most instances allows little accommodation of minority views, even though the "minority" might comprise a sizable 49% of the enfranchised population. Second, public resource allocation disputes often involve concerns that are not reducible to a yes-or-no decision. Or, in referenda, an individual might wish to vote yes if certain future circumstances become true, and no otherwise. The vote precludes conditional decision-making. Elections limit the expression of opinion by forcing voters to cast their ballots for candidates who usually represent "packages" of positions on various issues. Again, the ultimate outcome of initiatives, referenda, and elections is unlikely to reflect the true wishes of the voting community on any particular public resource allocation dispute. Lastly, the chances of attaining pareto-optimal decisions are usually forfeited by the rigid yes-or-no structure of the ballot. Trades that might maximize joint gains are precluded.

Opportunities for concerned and affected parties to express their views on the judgments made by administrative agencies usually take the form of ad hoc participation in issue-specific public hearings, citizen advisory boards, and public opinion polls and surveys. These methods, too, are limited and fall short of the benefits of direct participation in mediated negotiation.

The outcome of disputes resolved administratively may not appear fair to the community since public input is seldom binding. Decisions are usually made behind closed doors and certain groups often feel frustrated about their inability to influence them. The long queue of legal suits before the courts provides an indication of the lack of success of most administrative dispute resolution efforts.

The judicial process is perhaps the most visible means of dispute resolution. It is not only a means of decision-making, but it is also a device for contesting resource allocation decisions made by legislative and administrative bodies. The adversarial character of legal proceedings, however, discourages joint problem solving and short circuits the search for mutual gain. Typically, the issue is whether a given administrative decision is legal, not whether it is wise. Judicial dispute resolution rarely leaves the disputants with a better working relationship than they had before the conflict erupted.

While mediated negotiation may raise serious questions about the acountability of mediators and the representation of all groups, when compared to traditional means of dispute resolution mediated negotiation —as a *supplement* to conventional legislative, administrative, and judicial processes—is quite appealing.

ROLE AND RESPONSIBILITY OF THE MEDIATOR IN PUBLIC RESOURCE ALLOCATION DISPUTES

Public resource allocation disputes invariably involve the interests of parties not easily represented, as in the case of natural resource management decisions affecting future generations. Consideration of the interests of all affected parties, however, often is crucial for the successful implementation and stability of agreements. How can mediation in the public sector be structured to take account of externalities and to ensure appropriate representation of all interested parties?

In labor mediation, negotiating parties are expected to act in their own best interest. While the parties directly involved in public resource allocation disputes rarely consider the interests of unrepresented stakeholders voluntarily, especially if doing so would impinge on their own interests, a mediator might encourage active consideration of hard-to-represent interests. Such prodding might take the form of question-asking. For example, the various proposals on other named (but nonparticipating) groups. In other words, the mediator might purposefully shape the mediation *process* in an effort to influence the *outcome*. This would help assure that mediated settlements serve unrepresented interests to the greatest extent possible.

How might mediators achieve such a result without jeopardizing their neutrality in the eyes of the parties actively involved, and without asserting personal power that nonelected individuals are not expected to have?

One step might be to imagine a credo for mediators to which all those practicing in the public sectors would subscribe. Such a credo should include normative statements regarding the ethics of intervention in public sector conflicts, as well as the following:

(1) Guidelines for defining stakeholding interests in ad hoc dispute resolution and methods of identifying their legitimate spokespersons.
(2) A list of the objectives of ad hoc negotiation and standards for the conduct of negotiation.
(3) A description of mechanisms for ensuring the protection of interests not present at the bargaining table and not directly involved in negotiation.
(4) Prescriptions about the terms of final agreement and the monitoring and implementation of such agreements [Center for Environmental Problem Solving, 1982: 56-61].

We would urge that all potential stakeholding interests be informed that a mediation process is to occur and be given advice on how they can participate. Second, all stakeholding interests should be told how representatives will be selected, and again, how they might become involved. Third, those unable to represent themselves ought to be given the assistance necessary to present their views effectively. Fourth, private stakeholder representatives, who should be selected by those they represent, should be required to state clearly the extent to which they are authorized to speak on behalf of their constituents. Finally, all stakeholding interests, whether represented directly in the negotiations process or not, should be provided the opportunity to express their views on issues under consideration (through a public hearing, at special meetings of the negotiating parties, etc.).

We would further urge that the objectives of each mediated negotiation be stated explicitly and approved by the participating parties. Ground rules should be adopted by consensus to guide the pacing of the negotiation (with attention to time for thoughtful reflection and consultation with constituents), confidentiality, and communications with the public.

Procedures should be integrated into the negotiation process to ensure the protection of those interests not represented at the bargaining table but likely to be affected by the ultimate settlement. The responsibility for "second guessing" what views such interests might express in the negotiation should not rest with the mediator; rather, the mediator should be prepared to question the negotiating parties as to how they perceive the welfare of those unrepresented will be affected by proposed agreements. If the mediator believes that the interests of stakeholders not present at the negotiation would be adversely affected, he or she ought to point this out. Responsibility for such action derives from the mediator's obligation to help the parties develop a *stable* agreement, since disgruntled parties might seek to block implementation of the negotiated agreement. In a similar vein, agreements should not be finalized until all the steps necessary to ensure implementation have been clarified. This might require public review and comment on the proposed agreement, or consultation with administrative bodies with relevant jurisdiction. Ideally, mediated negotiation should be conducted so as to leave the disputing parties in the best possible working relationship in the future.

In our view, the language of agreements should meet certain minimum standards. First, agreements should be comprehensible to the lay public. Details such as contingencies, linkages to formal decisions by bodies with pertinent authority, and remediation procedures should be stated explicitly. All the negotiating parties should carefully review the terms of agreement to ensure that joint gains have been maximized and that the agreement is grounded on principles that they will be prepared to endorse in the future.

Finally, from our standpoint, the roles and responsibilities of each of the participating parties—and the mediator—with respect to implementation and monitoring of the agreement should be specified in the written document.

The mediator should be required at the outset of the negotiation to outline in writing how he or she will ensure consideration of the points mentioned above. Such a procedure might protect the mediator from subsequent charges of bias, prevent the incidence of a "mediator with a mission" from subverting the negotiations, and ensure the integrity and credibility of the mediation process in the eyes of the public-at-large.

It has been suggested by a number of observers that the impartiality of the mediator is one of the prominent and critical conditions that makes mediation attractive to disputants in the first place. Although the mediator is expected to maintain an interest in the mediation *process,* it has been argued that he or she must be neutral with regard to *outcome.* Based on the labor mediation model, mediators assume the roles of catalyst, educator, translator, seeker of additional resources, bearer of bad news, agent of reality, and scapegoat (Stulberg, 1980). Our proposal, that mediators might not be neutral with regard to the adequacy of representation, has been attacked as heresy in the mediation field (McCrory, 1980).

While it may be necessary for mediators to be perceived as nonpartisan, the claim of neutrality, in our view, is misleading. Mediators are rarely disinterested in the outcome of their efforts. Every mediator has a motive for engaging in dispute resolution. Whether that motive is primarily money, fame, or public service, mediators have an interest in bringing parties not only to an agreement, but to an agreement that satisfies the disputants and "sits well" with their peers.

The growing popularity of alternative methods of dispute resolution (mediation, arbitration, etc.) has created an increasing willingness to experiment with mediation in public sector disputes. Because of the substantial and long-lasting impacts that public sector resource allocation decisions can have on the public welfare, those who play mediating roles in public sector disputes ought to reflect on the special responsibilities that face them.

SEARCHING FOR AN APPROPRIATE MODEL OF PRACTICE

THE LABOR MODEL AND ITS SHORTCOMINGS

Collective bargaining has provided the model of practice for most professionals interested in public sector dispute resolution. In at least one type of public dispute, involving environmental impacts, the labor model has been found inadequate (Susskind and Weinstein, 1980). There are strong indications that in the larger realm of public resource allocation disputes, the labor model may prove similarly inappropriate.

In collective bargaining situations, the mediator is assumed to be preoccupied primarily (if not exclusively) with *process*. In contrast, as suggested earlier, it may be preferable for the mediator in environmental and other public disputes to assume the additional responsibility of attending to certain key qualities of the *results* of the resolution process (i.e., fairness, efficiency, and stability).

Discrepancies between these two conceptions of the mediator's role and responsibilities may be accounted for by differences in the nature and context of the disputes and in the relationships among the disputing parties. Seven aspects of public sector disputes which call into question the applicability of the labor mediation model to public dispute mediation have been identified.

(1) While the parties in labor disputes are easily identifiable and able to select spokespersons to participate in mediation, groups whose interests are likely to be affected by public resource allocation decisions ofen are not. Fifty years of experience in the labor relations field has helped to institutionalize both expectations and procedures for representation. Such institutionalization has not occurred in the public disputes field.

(2) While the issues at stake in labor disputes are fairly well defined (wages, fringe benefits, working conditions), and the distribution of costs and benefits is more or less predictable, in public sector disputes the concerns are frequently amorphous and difficult to articulate (e.g., the risks involved with the siting of hazardous wastes), and the magnitude and distribution of impacts is not well understood.

(3) In collective bargaining, the relationship between the disputing parties is on-going, well established, and involves familiar strategies (strikes, lock-outs, etc.). In public sector disputes, the conflict may represent a one-time encounter between adversaries who have never negotiated with each other before.

(4) The parties involved in labor disputes are relatively experienced in negotiating techniques. In public sector disputes the experience of the parties in negotiation varies tremendously; often some parties may be completely new to the give-and-take of negotiation.

(5) In labor disputes the parties' interests in settling are usually symmetrical (they both incur increasing costs the longer the dispute remains unresolved). This is not always the case in public sector disputes. In land use disputes, for example, environmental groups may come out ahead as long as no decision is reached.

(6) Labor mediation usually entails bilateral negotiations; public sector disputes commonly involve numerous public agencies and several special interest groups. Multilateral disputes (and the attendant issues of coalition politics) make public disputes much more complicated and unpredictable.

(7) In collective bargaining, potential "spillover effects" caused by excessive demands are minimized by standard references to inflation rates, government consumer price indices, and other indicators which guide the fairness of the settlement. In public sector disputes, similar constraints have not been developed to moderate the demands of individual negotiators (Susskind and Weinstein, 1980).

In summary, since the structure, context, and content of collective bargaining is well established, a mediator acting only as the guardian of the process might well be acceptable. Representation is rarely an issue since the parties are readily identifiable and participate directly. There is less need for the mediator to serve as educator since the parties are usually experienced in negotiation and well informed about the issues. The bilateral nature of negotiations between parties accustomed to bargaining with one another reduces the pressure on the mediator to actively coordinate concessions and counterproposals. Also, the parties' continuing relationship tends to ensure their compliance with both procedural conventions and the terms of negotiated agreements. These assumptions, in our view, do not match the circumstances surrounding most public sector disputes.

THE INTERNATIONAL MODEL

The role of mediators in international disputes contrasts sharply with the labor model of mediation. In international mediation, the mediator maintains overt control over the proceedings and plays a much more active part in the development of the terms of settlement. This, in our view, resembles more closely the appropriate role of mediators in public sector disputes.

Zartman and Berman point out that "nothing requires the third party itself to be subtle and indirect, except for the general requirements of effectiveness" (1982: 78). It is acceptable, according to Zartman and Berman, for the mediator to take an active posture. He or she can use tactics such as pointing out benefits that will flow from a solution or new possibilities for resolving the problem, showing harm that will occur if no solution is found, or even taking a more active stance and offering inducements for a negotiated outcome or threatening deprivations if one or both parties refuse to talk.

Although Henry Kissinger is generally considered exceptional among international mediators, Pruitt explains that Kissinger's intervention in the Middle East illustrates a number of traditional mediation strategies and techniques (Rubin, 1981). These extend beyond the role of "facilitator" or "catalyst." As mediator, Kissinger

(1) directly controlled all communications between the disputing parties;

(2) actively persuaded the parties to make concessions;

(3) acted as a scapegoat and deflector of the parties' anger and frustration, rather than allowing the parties to express their emotions to one another;

(4) coordinated the exchange of concessions, and, by so doing, masked the bargaining strengths of the parties to one another;

(5) made his own proposals for possible resolution; and
(6) created and maintained the momentum of the talks.

Moreover, Kissinger's entry into the Israeli-Arab conflict was strongly motivated by the interest of the U.S. government. In *Dynamics of Third Party Intervention,* a collection of analyses of Kissinger's Middle East efforts, Rubin notes that "several contributors conclude that Kissinger was primarily interested in protecting or enhancing the power and reputation of the United States in the Middle East, particularly in relation to the perceived interests and objectives of the Soviet Union." (1981: 274). Kissinger's interest in bringing the two parties to a settlement was apparently strong enough to warrant exorbitant promises of U.S. military and economic assistance aimed at inducing the parties to make concessions.

How can a mediator have an agenda of his or her own and still retain the trust of the parties? Both Fisher and Zartman have commented on this issue. Zartman (1983) suggests that mediators are not indifferent to the prospect of reaching agreement, or to the principles that are referenced in choosing among alternative solutions, or to the ways they are perceived by the parties before, during, and after a dispute. He also suggests that mediators typically exert leverage by taking advantage of the parties' relative eagerness for a settlement, suggesting possible side payments, and allowing the parties to "be soft, but act tough" (by transmitting concessionary offers privately while the parties continue to posture in public). Such active involvement in negotiations suggests that mediators are far from neutral, although Zartman does emphasize that mediators manipulate the parties only with their tacit permission. Fisher (this issue) suggests that mediators can exert influence in the same way any party can, by taking advantage of (1) the power of skill and knowledge, (2) the power of a good relationship, (3) the power of a good alternative to negotiating, (4) the power of a good option, (5) the power of legitimacy, and (6) the power of commitment. Mediators can and do exert influence. If mediators of international disputes can play such an active role and still retain the confidence of all the parties, why should mediators in public sector disputes adopt the more passive style of their labor counterparts?

OBSTACLES TO MORE WIDESPREAD USE OF MEDIATED NEGOTIATION IN THE PUBLIC SECTOR

There are several obstacles to more widespread use of mediated negotiation in the public sector.

REPRESENTATION

One of the first hurdles to overcome, as we have noted already, is the identification of all the parties likely to hold an interest in the outcome. In private disputes, the affected parties identify themselves. In public disputes, especially those with spillover effects, the definition of legitimate stakeholding interests can itself lead to conflict.

Assuming the problem of identifying interests can be overcome, the next obstacle is to ensure that appropriate spokespersons are selected. The lack of organization or structure of certain interests hinders the selection process. However, since the effectiveness of a negotiated agreement often depends on the ability of representatives to reflect accurately and respond effectively to the needs, priorities, values, and interests of the groups involved, the selection of spokespersons is critical. Difficulty in ensuring that spokespersons have the authority they need to commit their constituents may undermine an entire effort.

Finally, the ad hoc selection of a representative to participate in mediated negotiations may provoke opposition from true believers in "representative democracy." Our system of government was established on the premise of representation by elected officials. Beginning with the Interstate Commerce Act of 1887, officials have delegated limited public policymaking authority to independent commissions and "New Deal"-type agencies. This has not, however, been achieved without criticism (Lowi, 1969). Mediated negotiation in the formulation of public policy and public resource allocation decisions may suggest to some yet another undesirable step away from representative democracy (Haefele, 1974).

LINKING INFORMAL NEGOTIATION TO FORMAL REGULATORY AND ADJUDICATORY MECHANISMS

Elected decision-makers may hesitate to participate in a mediation effort. They may feel threatened by a process that forces them to surrender even a modicum of their authority. Government agencies may be unsure about the propriety of participating in ad hoc negotiation in light of their legislative mandates. Reporting on recent U. S. Geological Survey (USGS) and Council on Environmental Quality (CEQ) experiments with environmental mediation, Sachs found that "federal officials fear that mediated settlement might be challenged under the Administrative Procedures Act" (Sachs, 1982: 97).

Individuals and action groups participating in informal dispute resolution efforts may feel uncertain about the extent to which they relinquish their constitutional rights if they agree to participate. They may be concerned that statements made during informal negotiations will be used against them should negotiations fail and litigation follow. Sachs notes that "some attorneys feel the use of collaborative procedures in the early stages of a case might weaken their position in later court action" (1982: 97).

INSUFFICIENT INCENTIVES TO BRING ALL THE KEY PARTIES TO THE BARGAINING TABLE

A significant hindrance to the more widespread use of mediated negotiation in public resource allocation disputes is the lack of sufficient incentives to bring all disputing parties, particularly the most powerful, to the bargaining table.

In disputes involving groups with unequal bargaining power, the party holding the advantage may not recognize the need for mediation. The more powerful group may believe that it can achieve its goals without making concessions. Negotiations are unlikely to attract all the parties to the bargaining table as long as one or more parties is convinced that it can "win it all."

UNFAMILIARITY WITH MEDIATION

Another obstacle to more frequent use of mediated negotiation is the sheer lack of information about the method and its advantages. Past experiments with mediated negotiation in the public sector have not received much attention in the press, government publications, or in the university programs that train administrators, planners, and lawyers. The concept of mediation remains tied, in the public's mind, to collective bargaining, divorce proceedings, and, more recently, community disputes (consumer complaints, disputes between neighbors, and other small-scale disagreements).

AVAILABILITY OF TRAINED MEDIATORS

Even if an administrator or a private citizen involved in a public resource allocation dispute wishes to advocate a mediated approach, the lack of trained mediators acceptable to all the parties may impede the effort.

Disputants in search of a nonpartisan and qualified mediator are often at a loss as how to locate a suitable person. Referral services are not yet well established. Thus far, most mediators are volunteers. Prominent citizens, respected by all the parties in the dispute or identified through an ad hoc network of professionals in the field of dispute resolution, may be available. This is not a system that can work as the demand grows.

The payment of mediators is a sensitive matter. The parties to a dispute may question the nonpartisanship of a mediator paid by only one of the parties. Most of the experiments in public sector mediation have been financed by private foundations. These funds are limited. No equivalent to the Federal Mediation and Conciliation Service (one source of mediators in collective bargaining disputes) exists yet. Mechanisms for equitable sharing of the costs of mediation will be needed to overcome a critical barrier to the more widespread use of mediation in public disputes.

CONCLUSION

Some of the obstacles described above may dissolve as the field of public dispute resolution matures and existing institutional arrangements are adapted to accommodate the peculiarities of mediated negotiation. Other obstacles will give way only to further research and experimentation.

Our objective in this article has not been to advocate the use of mediated negotiation in public disputes, but rather to urge its proponents to consider seriously whether mediators can be held sufficiently accountable to the interests of the public at large. In our view, mediators *might* be sufficiently accountable, but only if (1) they choose an appropriately activist model to guide their practice (which in our view is definitely not the labor mediation model); (2) they adopt an appropriate credo that is known to all potential participants in each mediated negotiation effort; (3) they assume measures of success that emphasize the quality (but not the particular substance) of agreements; and (4) they continue to seek better ways of overcoming the obstacles to more widespread use of mediated negotiation in the public sector.

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The Role of Mediation in Public Interest Disputes

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In recent years this country's traditional reliance on the courts to resolve disputes has come under serious question.[1] Although there is some evidence that as a society we are no more litigious than we have ever been, the quality and mix of our litigation certainly has changed.[2] Many rights being asserted in litigation today did not exist twenty years ago.[3] Also, courts have increasingly recognized private rights of action for wrongs for which statutory remedies were non-existent or were limited to administrative enforcement.[4]

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[1] *See, e.g.*, Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFFALO L. REV. 487, 502-03 (1980).

Professor Leonard L. Riskin attributes the American emphasis on adversarial alternatives to our national culture, which places a high value on "freedom as an absence of restraint and on autonomy and individual liberty as the highest goal." He contrasts the Confucian emphasis on harmony as the natural and desirable condition. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 30 (1982).

[2] *See* J. LEIBERMAN, THE LITIGIOUS SOCIETY (1981); Cavanaugh & Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 420 (1980); Friedman, *The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America*, 39 MD. L. REV. 661 (1980); Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 907 (1971). These sources are cited in an unpublished paper by Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Alledgedly Contentious and Litigious Society*, presented at the National Conference on the Lawyer's Changing Role in Resolving Disputes, Oct. 1982, at the Harvard Law School (on file with the authors). It is worth noting that in California one out of every hundred citizens files a lawsuit each year. Lundquist, *Humanizing Litigation*, LITIGATION, Spring 1978, at 3, 4.

[3] For example, the right not to be discriminated against in employment based on race or sex, the extension of the protections of due process to large classes of individuals including welfare recipients, prisoners, and the mentally ill, and the requirement of environmental impact reports, are all relatively recent developments.

The rapid development of public interest law[5] in the past two decades has contributed to the expansion of legally cognizable rights. Both through landmark decisions [6] and the skillful use of publicity,[7] public interest litigators have had a profound impact on our society and the way we do business. Yet, despite the many dramatic successes achieved by public interest litigants in the courts, there are good reasons to consider alternative approaches for resolving public interest disputes.

The economic motivation propelling other civil litigants toward alternatives to litigation[8] is equally apparent in the public interest sector.[9]

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[4] On the implication of private rights of action under federal statutes, see articles collected in Note, *Private Rights of Action Under Title IX of the Education Amendments of 1972: Cannon v. University of Chicago*, 3 HARV. WOMEN'S L.J. 141, 142 n.8 (1980). *See also* Ronfeldt, *Implying Rights of Action For Minorities and the Poor Through Presumptions of Legislative Intent*, 34 HASTINGS L.J. 969 (1983).

[5] The term "public interest law" first was applied in the mid-1960's to the work of legal groups making efforts to secure legal services for those lacking them. Note, *In Defense of an Embattled Mode of Advocacy: An Analysis and Justification of Public Interest Practice*, 90 YALE L.J. 1436, 1436 n.3 (1981). *See* Cooke, *Public Interest Law and Lawyers for the Public Interest, 34* REC. A.B. CITY N.Y. 6, 7 (1979).

Examples of public interest litigators include the American Civil Liberties Union, which emphasizes personal freedoms and assumes that if government is to serve the public interest, it must be closely monitored from the outside; the NAACP Legal Defense Fund, which uses law strategically to lay the groundwork for political change; the Legal Services Corporation, which acts as an independent monitor of government and private activities affecting the poor; the Lawyers' Committee for Civil Rights Under Law, which involves private lawyers in representing and legitimizing unrepresented interests in constitutional and statutory law enforcement; and the public interest law firms, supported by foundations and the general public, such as the Environmental Defense Fund, the Public Citizen Litigation Group, and Public Advocates, Inc., which address the concerns of environmentalists, consumers, the elderly, children, women, prisoners, and many other under-represented constituencies. COUNCIL FOR PUBLIC INTEREST LAW, REPORT: BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 19-21 (1976); Note, *supra*, at 1436 n.3.

[6] For a list of cases, see Note, *supra* note 5, at 1437 n.6.

[7] The public education aspect of public interest practice can be a major service in itself. Although Mr. Wolinsky and Ms. Arriola, in their accompanying Commentary, *Public Interest Practice in Practice: The Law and Reality*, 34 HASTINGS L.J. 1207 (1983), point to *Committee for Childrens' Television Inc. v. General Foods Corp.*, No. 61056 (Cal. Ct. App., 2d Dist., Mar. 30, 1982), as a "non-victory," Arriola & Wolinsky, *supra*, at 1221-23, the publicity surrounding that suit and the F.T.C. hearings which followed have gone a long way toward educating the public about the nutritional value of sugared breakfast cereals. It is not suprising that a major consideration in decisions about the initiation and conduct of public interest litigation is the potential impact of publicity about the litigation. Letter from Greg Thomas (lawyer for the Committee for Childrens' Television Inc.) to Howard Herman (May 24, 1983) (on file at the HASTINGS LAW JOURNAL Office).

[8] *See, e.g.*, the Keynote Address by Chief Justice Warren Burger to the Pound Conference, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 92 (1976). More recently, the Rand Corporation has released a study which found that the average cost

Public interest lawyers know that resources are scarce and that their commitment to one battle means that another must be foregone. In a time of decreased public funding,[10] survival of public interest lawyering may depend upon the availability of cost-effective alternatives to litigation.[11]

Additionally, the substantial delays involved in litigation[12] may rob public interest litigants of many of the benefits they turned to litigation to achieve.[13] Too often, the remedies available through litigation also fall short of complete relief.[14]

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for processing a tort case through jury trial in federal district court *exceeded* the average award for such cases. Report by Dr. James S. Kakalik and Abby Robyn, "Costs of the Civil District Court: Expenditures for Processing Tort Cases," Rand Corp., Santa Monica, Cal., Oct. 1982. This is, of course, in addition to the costs and attorneys fees borne by the parties. Commenting on a preliminary draft of this study, Chief Justice Burger observed, "If this is correct, we need to ask whether it is wise to continue using taxpayers' money in this manner." Burger, *Arbitration, Not Litigation*, NATION'S BUS., Aug. 1982, at 52.

[9] *See, e.g.*, Everett, *Financial Assistance for Public Interest Group Participation in Environmental Decisionmaking*, 10 ENVTL. L. 483 (1980) (mounting financial pressures on public interest groups in the environmental sector).

[10] Note, *supra* note 5, at 1437 n.8.

[11] *See* Green, Marks & Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 LOY. L.A.L. REV. 493 (1978) (cataloguing the expenses of large suits, and offering an example of an alternative dispute resolution process succeeding in practice in the kind of complex litigation that characterizes many public interest disputes).

[12] By way of example, the Judicial Council of California has noted that the *median time* to decision for civil cases (from the date on which notice of appeal is filed to the filing of the Appellate court's decision) ranges from one year to twenty-nine months. JUD. COUNCIL OF CAL., 1982 ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 62 & Table XIV (1982).

[13] Burger, *supra* note 8, at 53-54.

[14] *See, e.g.*, Comment, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief*, 122 U. PA. L. REV. 1330 (1974). Using the example of suits against local housing authorities, this comment suggests the extent to which court victories can be nullified by the difficulty of enforcing court-ordered change against a public agency defendant with broad discretionary powers. The author observes that, for a variety of reasons, including the difficulty of identifying a responsible individual, courts are hesitant to exercise their sole real enforcement power—citation for contempt—against public officials.

Even when the defendants attempt to comply with a court-ordered program, the practical problems of implementation and monitoring compliance can be enormous. *See, e.g.*, Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975) (tracking the implementation of a judicial decree ordering Alabama's state hospital system to deliver adequate treatment to mentally impaired patients).

An additional problem with judicial resolution of public interest law suits is that it forces the judiciary into a legislative role. *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Although Professor Chayes felt that, on balance, the judiciary could be entrusted with this expanded role, he noted the very serious problems inherent in subjecting both the parties to a suit (and a multitude of nonparties) to continual judicial oversight of regulatory policy devised by the court. By contrast, mediated negotiations allow public agencies to maintain their delegated role of administering policies set by the legislature; the agencies simply are given the opportunity to perform that role with the advantage of input from the most directly concerned sector of the

This Commentary addresses one alternative to litigation: mediation.[15] First, the mediation process is described. Then its application to public interest disputes is explained. Finally, two proposals are advanced for incorporating mediation into the process of resolving public interest disputes.

The Mediation Process

Mediation is facilitated negotiation. Mediators are used by parties to a dispute to: 1) depersonalize the dispute, thus reducing the level of emotion; 2) enable discussion to take place when the parties are not willing to talk directly to one another; 3) permit confidential information to be used to facilitate a settlement without revealing it to the other side; 4) clarify issues and identify the interests of the parties; 5) develop new options for a mutually satisfactory resolution; and 6) prevent conflict aftermath.[16]

Mediation is distinct from arbitration, the most familiar alternative dispute resolution mechanism. The following chart[17] illustrates some of the similarities and differences between mediation and arbitration:

Mediation	*Arbitration*
1. Voluntary	1. Voluntary (usually)
2. Impartial	2. Impartial
3. Mediator selected by the disputants	3. Arbitrator selected by the disputants
4. Mediator can explore broad avenues of cause, help identify issues, and explore alternatives for resolution	4. Arbitrator can address only those issue-questions which the parties have jointly agreed to submit
5. Disputants rarely submit evidence or have witnesses since testimony as such holds no weight	5. Disputants can submit evidence and have witnesses

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public. *See* M. Cappelletti & J. Jolowicz, Public Interest Parties and the Role of the Judge in Civil Litigation (1975).

[15] Although this Commentary focuses on mediation, it should be noted that a wide variety of alternative dispute resolution procedures have been developed, including neutral fact finding, the mini-trial, and a combined mediation-arbitration procedure. *See* "Alternative Methods of Dispute Settlement, A Selected Bibliography," compiled by the Special Committee on Alternative Means of Dispute Resolution of the American Bar Association, Dec. 1979, and updated May 1982.

[16] Conflict aftermath is the continuation of conflict after the apparent resolution of a dispute.

[17] Reprinted by permission of the American Intermediation Service and William F. Lincoln from a manual on negotiation and mediation.

6. Disputants participate in developing procedures	6. Disputants do not participate in developing procedures
7. Mediator can have private meetings (caucuses) with a disputant	7. Arbitrator cannot have private meetings (caucuses) with a disputant
8. Disputants fully participate in the decision-making process regarding substantive outcomes	8. Disputants do not participate in the decision-making process regarding substantive outcomes
9. Mediator has no authority to render a decision	9. Arbitrator has authority to render a decision
10. No decisions, only settlement agreements between the parties	10. Decision is "final and binding"
11. Primarily interested in "mutual gain" resolutions	11. Determines "right" and "wrong," or guilt and innocence, rectification

Mediators are "process" experts. To be effective, they need not have expertise in the subject of the dispute. Initially, they help the parties decide what is to be discussed and how the discussions are to take place. The parties decide whether, and when, to bring in experts.

Mediation also offers the parties maximum control over the process of resolving the conflict, an opportunity to redefine the area of discussion so that the larger interests can be served, and a collaborative framework rarely found in formal proceedings. Even when direct negotiations have broken down, mediation can provide a face-saving procedure for reestablishing communication among the parties.

For decades, mediation had proven an effective means of resolving complex disputes in the field of organized labor.[18] More recently, mediation has become an important adjunct to litigation in family law matters.[19] Parties frequently involved in general civil litigation also are beginning to investigate alternatives to adverserial processes.[20]

To date, state legislation concerning mediation has been limited.[21] However, the number and scope of mediation programs are increasing dramatically.[22] There is reason to believe that mediation also can contribute substantially to the resolution of public interest disputes.

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[18] For a discussion of mediation in the collective bargaining context, see W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING (1971).

[19] In California, for example, mediation is mandated for child custody matters in divorce cases. CAL. CIV. CODE § 4607 (West. Supp. 1983). A substantial segment of the family law bar nationwide is beginning to utilize collaborative processes, including having the same lawyer—or in some cases a lawyer and therapist team—work with the separating couple. *See generally* AM. BAR ASS'N, ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION (1982); Riskin, *supra* note 1.

[20] *See, e.g., "Managing" Company Lawsuits to Stay Out of Court*, BUS. WK., Aug. 23, 1982, at 59.

[21] For a compilation of state laws relating to mediation, see STATE LEGISLATION ON DISPUTE RESOLUTION (A.B.A. Special Committee on Alternative Means of Dispute Resolution Monograph No. 1, June 1982).

The Value of Mediation in Public Interest Disputes

Three characteristics of public interest litigation particularly suggest the value of mediation in public interest disputes: 1) the tendency of the parties to take positions based on principle that put the essentials of discussion beyond negotiation; 2) the fact that much public interest litigation never actually resolves the underlying controversies; and 3) the frequent failure of government defendants to identify someone to take responsibility for settling disputes. Following the discussion of each of these characteristics is a description of how mediation can help.[23]

Much Public Interest Litigation Is Instituted and Maintained Because the Parties Take Positions Based on Principles That Are Beyond Negotiation

Professor Marc Galanter of University of Wisconsin Law School has analyzed nonsettling cases to determine the reason for their longevity. He concludes that these hard-to-settle cases often involve situations in which a party needs the judicial declaration itself, rather than simply a settlement of the immediate dispute.[24] In some cases a litigant wants to secure a declaration of "good law."[25] In others, a premium is placed on having an external agency make the decision.[26] Frequently, accepting a negotiated resolution is perceived as weakening the future bargaining credibility of a party.[27] In other cases a vindication of fundamental values is sought.[28]

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[22] Ronald L. Olson, Chair of the A.B.A. Special Committee on Alternative Means of Dispute Resolution, notes in his foreword to the monograph STATE LEGISLATION ON DISPUTE RESOLUTION, *supra* note 21, that more than 400 private and government agencies are currently providing informal dispute resolution services. In addition, 188 communities in 38 states have established "neighborhood justice centers." For a description of an exemplary program of this type, see SAN FRANCISCO COMMUNITY BOARDS, 1981 ANNUAL REPORT (1981) (on file with authors). Mediation also has come to play an important role in the juvenile justice field. *See* E. VORENBURG, A STATE OF THE ART SURVEY OF DISPUTE RESOLUTION PROGRAMS INVOLVING JUVENILES (1982).

[23] There are other characteristics of public interest litigation that suggest the potential value of mediation. For example, it is the authors' experience that public interest litigants often use the threat of litigation to encourage settlement of the underlying issues. Mediation, as a more direct method of bringing the parties to the negotiating table, would be a more efficient use of time and money and would better serve the public interest.

[24] Galanter, *supra* note 2, at 24-25.

[25] *Id.* at 26. Among the "good law" cases, perhaps the most famous is Brown v. Board of Educ., 347 U.S. 483 (1954).

[26] Galanter, *supra* note 2, at 25. For example, a government or corporate employee not wanting to take responsibility for a settlement might be very anxious to have a third party decide the cause.

Although such perceptions make settlement more difficult, the fact is that parties in general civil litigation frequently change their perceptions of what is and is not negotiable. Almost ninety percent of all civil lawsuits eventually settle.[29] In contrast, perhaps only fifty percent of the public interest cases settle.[30] It is unclear how much of this difference in settlement rate is attributable to the inability of particular parties to establish and maintain effective communication and how much is attributable to the unique nature of public interest litigation. A look at the process of mediated negotiations suggests, however, that its application to public interest disputes could substantially reduce the need for litigation.

The most important function of any negotiation is to educate the parties about their own and opposing interests. This enables them to take into account the perspectives and needs of all parties to the dispute in considering settlement options. By utilizing an intermediary, this educational process may even take place without face-to-face discussions by the parties. The intermediary permits the parties to explore possible resolutions without either party giving up its litigating stance or revealing confidential information to other litigants.

Sometimes this educational process of settlement talks will induce even the most committed believer in principle to substitute a negotiable objective for a non-negotiable one which has contributed to impasse. For example, a group that in principle opposes the building of nuclear power plants might be persuaded to negotiate over the terms and conditions on which a power plant would be built (or completed) if the plant would use only waste fuels already generated by the nation's nuclear weapons program.

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[27] *Id.* Some trial lawyers feel impelled to try the hard cases, to maintain credibility in further negotiations. Belli, *Pretrial: Aid to the New Advocacy*, 43 CORNELL L.Q. 34 (1957). A frequent defendant such as a utility company may not want to make settlement too easy for fear of encouraging further claims. An employer might be reluctant to compromise in a dispute with one employee for fear that other employees will demand equal treatment.

[28] Galanter, *supra* note 2, at 26. The National Rifle Association's efforts to strike down legislation aimed at gun control is one example.

[29] *Id.* at 23.

[30] Letter from Sidney M. Wolinsky, co-founder of Public Advocates Inc. (May 19, 1983) (on file with the authors).

A lower rate of settlement is also suggested by statistics published by the Aministrative Office of the United States Courts. For the 12-month period ending June 30, 1981, 16.8% of all civil rights cases (excluding United States cases and prisoner petitions) reached trial. This is compared to 6.6% for all civil cases generally. AD. OFF. OF THE U.S. CTS., 1981 ANNUAL REPORT at table C4 (1981). The Administrative Office does not keep separate statistics for public interest litigation other than civil rights cases. Civil rights cases (excluding United States cases and prisoner petitions) terminated within the same period also were pending an average of one-third longer than civil cases in general. *Id.* at table C5A.

Much Public Interest Litigation Never Resolves the Underlying Controversy and Is Incapable of Doing So

Litigation, as well as settlement discussions ancillary to an adversarial process, generally addresses only the legal issues in which the suit is framed. Because the parties stand "in the shadow of the law,"[31] they may never address many of the real interests involved in the dispute.

Consider, for example, the action filed by Ralph Nader against Allegheny Airlines seeking damages for being "bumped" from an overbooked flight.[32] Although the publicity generated by the suit apparently did induce corrective measures by the airline industry and the Civil Aeronautics Board,[33] the remedy actually sought by Nader—CAB prohibition of overbooking—was not even at issue in the litigation.[34]

Much of the litigation over environmental impact reports also falls into this category. Usually, the plaintiffs want either to stop or to force modification of a project. The legal issue employed to reach this result is a claim that the project's environmental impact report is deficient. In *Las Raza Unida v. Volpe*,[35] plaintiffs alleged that a California highway project had failed to comply with various federal statutes dealing with impact on the environment and housing. After protracted litigation, plaintiffs obtained an injunction, which was upheld on appeal,[36] and attorneys fees.[37]

The underlying interest of the plaintiffs in this case was to minimize destruction of homes and parklands.[38] The interest of the defendants was in furnishing improved transportation facilities. Were these interests so adverse that no plan satisfying all parties could have been developed? Or was it the absence of an effective alternative to litigation that forced these parties into adversary roles, in a lengthy and costly series of court actions paid for by the public? This "successful" public interest litigation did force some degree of consideration of the conflict between the public interest in housing and recreation on the one hand, and in transportation on the other. It did not meet the need to bring all interested parties together to develop options for satisfying these conflicting interests.[39]

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[31] The phrase is taken from Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979).

[32] Nader v. Allegheny Airlines, 365 F. Supp. 128 (D.D.C. 1973), *rev'd & remanded*, 512 F.2d 527 (D.C. Cir. 1975), *aff'd*, 426 U.S. 290 (1976), *on remand*, 445 F. Supp. 168 (D.D.C. 1978), *rev'd*, 626 F.2d 1031 (D.C. Cir. 1980). *See* Note, *Court Usurpation of CAB Function: The Problem of the "Bumped" Passenger*, 43 UMKC L. REV. 112 (1974).

[33] B. WEISBROD, PUBLIC INTEREST LAW 413 (1978).

[34] N.Y. Times, Oct. 21, 1973, § 4, at 12, col. 1.

[35] 337 F. Supp. 221 (N.D. Cal. 1971).

[36] 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 409 U.S. 890 (1972).

[37] 57 F.R.D. 94 (N.D. Cal. 1972).

[38] The project, as originally planned, would have diplaced 5,000 persons and destroyed a number of parks. *Id.* at 100.

Public Interest Disputes May Be Forced to Trial Because the Government Defendant Fails to Identify Someone Who Will Take Responsibility for Settling the Dispute

Public Advocates Inc., a public interest law firm with an impressive record of court victories, believes that the failure of government defendants to find someone who will take responsibility for settling disputes is one of the most exasperating features of public interest practice.[40]

In *Larry P. v. Riles*,[41] Public Advocates Inc. successfully sued to prevent placement of black children in classes for the mentally retarded on the basis of discriminatory I.Q. tests. Early in the dispute the State Department of Education had grounds to decide that the tests were, in fact, of questionable validity.[42] The plaintiffs' counsel have told the authors that they believe that the inability of the department to find someone to take responsibility for settling the dispute forced the case to trial. The result was that this case, filed in 1971, went on for nearly a decade.[43] Had a mediator helped to identify the interested parties and to clarify their settlement authority in the early stages of *Larry P.*, it is possible that the judgment and lengthy appeal could have been avoided.

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[39] A particularly poignant example of the need for effective mediation is furnished by Bracco v. Lackner, 462 F. Supp. 436 (N.D. Cal. 1978). In that case plaintiffs sought to prevent the abrupt closing of a San Francisco convalescent hospital for failure to comply with state standards. Most of the primarily low income patients were on Medi-Cal and were to be relocated to several facilities outside of San Francisco. Although the plaintiffs agreed that the facility needed to be brought up to code, they wanted to avoid relocation, the resulting "transfer shock," and disruption of patient relationships. They brought suit on a due process theory and won in district court. *Id.* The victory slowed down the closing process, but the patients eventually were moved, the facility closed, and the much needed convalescent beds lost.

Both the state and the patients had a strong interest in maintaining this facility. In fact, a bill was subsequently passed by the state legislature providing for the appointment of a receiver in such a situation. In a real sense, both the state and the attorneys for the plaintiffs were seeking to care for the interests of the same clients. A mediation could have brought together all of the interested parties at the beginning of the dispute, allowing exploration of a variety of options including receivership before mounting time pressures forced a closure of the facility.

[40] *See* Arriola & Wolinsky, *supra* note 7, at 1225-27.

[41] 495 F. Supp. 926 (N.D. Cal. 1979).

[42] *Id.* at 931-35. *See also* Larry P. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974) (per curiam) (ordering and affirming preliminary injunction).

[43] *See* 495 F. Supp. at 932-34 ("For a period of time it was thought that the Master Plan for special education in California, enacted in 1974, would address and perhaps remedy the problems raised by this case, but that hope never materialized. The case had to be brought to trial on the merits.").

The Value of Mediation

Mediation can solve these problems of public interest litigation. The mediation process focuses on each party's underlying interests from the beginning, when the issues for discussion are being developed and clarified. Mediators can help the parties use their differing needs and perspectives as the basis for achieving a mutually acceptable resolution rather than just seeing these differing interests as reasons to disagree.

Mediation of complex public interest disputes has proven successful in practice. The Institute for Environmental Mediation in Seattle, Washington, has investigated the applicability of mediation in more than fifty disputes and has settled a dozen complex lawsuits. One representative case is the *Riverside Community Landfill Dispute*,[44] which involved a dispute over a proposed replacement site for two existing landfills. With the aid of the Institute mediators, the parties realized that there could be no negotiated resolution as long as the focus was solely on an agreement over the proposed site. They therefore broadened their discussion to address the basic issue: what to do with the garbage. Industry representatives and environmentalists were included in the discussions. The result was that the entire group reached an agreement on a much broader set of solid waste issues in addition to agreeing on a replacement landfill site.[45]

As this case shows, failure to pursue collaborative discussions may be more costly than losing any particular settlement opportunity.[46] It is a lost opportunity for mutual education, for building consensus which will serve important long-term interests, and for resolving differences which otherwise cause additional clashes in the future.

One factor impeding the use of mediation in the public interest sector is that many public interest disputants only rarely become involved in the legal process;[47] they are consequently less experienced than corporate disputants at developing and implementing preventive strategies.[48] Public interest law firms and organizations do engage in dispute resolution planning similar to that in the private sector.[49] However, the planning often centers on selecting targets for litigation. It is not preventive planning that encompasses consideration of alternative dispute resolution procedures. How then, can alternative dispute resolution processes such as mediation be incorporated into the process of resolving public interest disputes? The present under-utilization of mediation comes not so much from a rejection of the collaborative approach as from a misunderstanding of the process and from excessive and conditioned reliance upon litigation. Also, governments make no budgetary allowance for such settlement services.[50]

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[44] Institute case files are case name-indexed. This case was mediated by Alana Kastner.

[45] THE INSTITUTE FOR ENVIRONMENTAL MEDIATION, SUMMARY REPORT TO THE VISITING COMMITTEE (May 1982) (on file at HASTINGS LAW JOURNAL Office).

[46] For other examples in the public interest field, see generally AM. ARBITRATION ASS'N, MEDIATION: A TRANSFERABLE PROCESS FOR THE PREVENTION AND RESOLUTION OF RACIAL CONFLICT IN PUBLIC SECONDARY SCHOOLS (1976); Conference Report, "Conflict Management: Its Application to Energy Disputes," Engineering Foundation Conference, Rindge, N. H. (Aug. 1979) (on file with authors); Reynolds & Tonry, *Professional Mediation Services for Prisoners' Complaints*, 67 A.B.A. J. 294-97 (1981).

[47] Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98 (1974).

[48] G. HAZARD, ETHICS IN THE PRACTICE OF LAW 141 (1978).

Some Modest Proposals

The following proposals are modest in that they do not require major commitments of resources before they can be tested in a variety of situations. Indeed, as funding for public interest advocacy becomes increasingly scarce,[51] the cost-effectiveness of mediation as compared to litigation will be more readily appreciated: mediated settlement discussion are measured in days, or even in hours, rather than in the years required by litigation.

Nor is complicated new legislation needed at this time. It seems wiser to test new mediation programs experimentally before enshrining—and thus limiting—them in legislation. Moreover, because the mediation process works only with voluntary participation, there is less need for legislative mandate. All that really will be needed is the opportunity to see how mediation can help; the marketplace will decide whether it should be incorporated formally into our dispute resolution processes, and on what scale.

Our first proposal is that the courts screen cases for mediated settlement discussions.[52] In this way, the courts could do much to help test the viability of mediation in the public interest field.[53]

The courts are already in the referral business in many areas for the purpose of channeling cases into arbitration.[54] Although mediation would require initial screening of a sort quite different from that required for arbitration, arbitration programs do demonstrate that a referral process is feasible. Cases appropriate for mediation could be referred by the court on its own initiative or at the request of the parties. Court referral has the advantage of letting the parties undertake negotiations without either side having to be the first to propose settlement talks.[55] Settlements could be entered as orders of the court in appropriate cases.

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[49] L. Mayhew, Law and Equal Opportunity 164 (1968).

[50] From the authors' personal experience litigating both on behalf of and against the United States government, it would appear that the Department of Justice approaches litigation cost control solely by tinkering with the amounts available for expenditure in litigation. Perhaps no one has considered any other alternative.

[51] *See supra* note 13 & accompanying text.

[52] For some time such projects have received serious consideration in federal court administration policy discussions. *See, e.g.*, Dunlop, *The Limits of Legal Compulsion*, 27 Lab. L.J. 67 (1976); Johnson, *Let the Tribunal Fit the Case—Establishing Criteria for Channeling Matters into Dispute*, 80 F.R.D. 166, 167-80 (1980).

[53] The authors believe that until non-adversarial processes are much better known and much more widely understood, court referral is essential.

[54] Local Rule 500 of the United States District Court for the Northern District of

Mediators could be drawn from panels of appropriately trained persons including but not limited to lawyers. Such a mixed panel is recommended to provide for situations where process considerations outweigh formal legal considerations. Mediation is faster and less expensive than litigation,[56] so a pilot program in the court could be funded for a relatively small amount. Costs could be defrayed by requiring modest fees from participating parties, thus giving them an added psychological investment in making the process work. If a pilot project demonstrates cost-effectiveness and settlement results, mediation referral programs in the courts can readily be made self-supporting by fees charged.[57]

Our second proposal is that the federal government explore the possibilities for mediated negotiations to resolve its own disputes. The United States frequently is involved in public interest litigation as a result of efforts by both corporate and public interest advocates to forestall unwanted governmental action.[58] Government officials often rely on litigation to avoid politically difficult decisions. This reliance is expensive and time-consuming as well as questionable as a matter of policy.[59]

California is representative of this type of court ordered arbitration, with trial de novo available on demand of either party within thirty days of entry of the arbitrator's award.

[55] In the world of the advocate, the initiative and timing of an offer to discuss settlement is often a carefully planned part of litigation strategy because of the perceived risks of an untimely overture.

[56] While hourly fees for mediators are comparable to those of litigation lawyers, a mediation may require only a few hours of a mediator's time, and rarely more than a few days, as contrasted with the enormous billing for litigation.

[57] Fees could be apportioned among the parties, to reflect their relative economic capacities. For example, when one party is substantially less prosperous than another, it is not unusual for it to offer to pay the first few days of mediation costs or some substantial percentage of the daily rate. Arrangements such as this tend to even out the risks of trying this alternative.

[58] An experiment in involving interested parties in negotiations over the terms of federal agency regulations prior to promulgation has already been set in motion. *See* Harter, *Negotiating Regulations: A Cure for the Malaise?*, Report to the Comm. on Interagency Coordination of the Administrative Conf. of the United States (Jan. 1982). While it is still too early to appraise the effectiveness of this model, its existence is a healthy sign of willingness by the federal government to explore alternatives to litigation.

[59] Litigation against the government in the public interest area is often a prime exam-

It will not be enough to make federal mediation services available.[60] Officials charged with the responsibility for developing and implementing government policy must learn to think in terms of collaborative rather than adversarial processes. This would require a major commitment from the highest levels of government, for the litigation habit is deeply ingrained.

The current economic situation is a good environment for such redirection, however. Even if Congress did no more than include a line item in every budget for settlement services, leaving it to each agency to decide how to use the money, we submit that there would be measurable savings by the end of each fiscal year.

Conclusion

Public interest groups, state and federal governments, and private corporations that frequently engage in public interest disputes should take the lead in increasing the use of negotiated alternatives to litigation. Even without the creation of new opportunities for the use of mediation, public interest litigants can avail themselves of the services of a growing number of private dispute resolution services.[61]

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ple of the limitations of litigation in addressing the underlying issues in a dispute. Consider the following two cases. In Environmental Defense Fund v. EPA, 636 F.2d 1267 (D.D.C. Cir. 1980), the Environmental Defense Fund (EDF) challenged regulations of the Environmental Protection Agency (EPA) which exempted from statutory ban roughly 95% of commercial PCB users. In a second case, Standard Oil Company attempted to secure judicial review of FTC procedures in a pending administrative law action concerned with charges of monopoly practices. Standard Oil Co. v. F.T.C., 475 F. Supp. 1261 (N.D. Ind. 1979).

The EDF eventually obtained a court order requiring reconsideration of the exemptions. During the reconsideration period (which was extended to almost two years) no comprehensive regulation of PCB usage has been in force, other than a limited interim inspection program negotiated by the parties. The first of the revised EPA regulations were not published until August 25, 1982—and were promptly challenged by both industry and environmental groups. The regulations dealing with the bulk of the PCB problem are slated for publication before December 1, 1983, with final regulations targeted for July 1, 1984. This time the regulations have been the subject of intense negotiations among the interested parties, the results of which have served as a framework for the EPA's proposals. Conversations with Jacqueline Warren, former EDF counsel, Sept. 1982, and with the EPA's Office of Toxic Substances, Oct. 1983.

In the FTC case, after two rounds in the federal district court wrangling over discovery rights in the administrative action, the parties ended up before the court of appeals just in time for the FTC's voluntary dismissal of the underlying administrative action. Conversation with Marge Coleman, FTC attorney, Sept. 1982.

The question posed is whether or not these broadside attacks and protracted lawsuits were the best way to resolve the legitimate concerns of the parties to these disputes.

[60] The Federal Mediation and Conciliation Service, which operates pursuant to 29 U.S.C. § 173(a) (1976), and the Department of Justice's Community Disputes Resolution Program are already in place to serve as models and provide specialized services.

[61] Representative are the Center for Public Resources' Judicial Panel in New York and the San Francisco-based American Intermediation Service. Such organizations provide

Failing some positive commitment to collaborative processes, we will remain the victims of our own expertise. Litigation, through increased refinement and abstraction, has become unbearably burdensome and is incapable of meeting the needs of litigants in many cases. It is as if, by improving our trial techniques, we have actually reduced our ability to resolve conflicts.[62] Both economy and social justice will be served by introducing collaborative conflict resolution techniques into our procedures for settling public interest disputes.

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panels of attorneys and retired jurists to assist parties in private dispute resolution processes such as mediation, "mini-trials," and neutral fact-finding. The American Arbitration Association has also begun to offer assistance in non-adjudicatory dispute resolution proceedings.

[62] As one commentator has pointed out: "At times it is as if litigation technology and support dominate the lawyers' art." Lundquist, *supra* note 2, at 4.

2. BACKGROUND ON DISPUTE RESOLUTION MECHANISMS

B. Minitrial

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MINI-TRIAL
IN PRACTICE

Lester Edelman is chief counsel and Frank Carr is chief trial attorney of the U S Army Corps of Engineers in Washington, DC This article is based on a presentation by Mr Edelman at the American Arbitration Association's Mini-Trial Conference in Atlanta in October 1986

The Mini-Trial:
An Alternative Dispute Resolution Procedure

LESTER EDELMAN AND FRANK CARR

The U.S. Army Corps of Engineers, concerned about the increasing time and expense to settle government-contract claims, examined alternatives to the traditional method of resolving disputes before boards of contract appeals. The option that it chose was the mini-trial, a voluntary, expedited, and nonjudicial process whereby the top management officials of each party meet to resolve a dispute.

The Corps of Engineers adapted the mini-trial to best suit its own organizational needs. This article describes the factors that were considered in designing the mini-trial and the Corps' experience with the process over the past few years.

A Chinese proverb says that "going to law is losing a cow for the sake of a cat." Although the government rarely litigates over a cow, the time and cost of litigation has escalated substantially over the years. In the government-contracting area, the present administrative appeal process for contract claims is neither timely nor inexpensive. Typically, a contract claim docketed before a board of contract appeals will consume years of effort until resolution. For the claimant, the cost of litigation, delays in receiving a decision, and the disruption to corporate management have made the present administrative system unsatisfactory.

The costs of pursuing a claim before a board of contract appeals have risen dramatically. Now, almost every claimant is represented by an attorney whose fees and expenses add to the cost of litigation. The rising use of attorneys is accompanied by an increase in discovery and its related

costs. The experience of the U.S. Army Corps of Engineers has shown that the discovery conducted in a board proceeding is now as extensive and costly as before a court. Further, claimants must continue to finance their current projects without the benefit of any of the proceeds from the claim.

Another source of dissatisfaction to the claimant is that the boards of contract appeals are slow in issuing decisions. The average nonexpedited case takes two to three years from date of filing to date of decision. Furthermore, in a complex case, it is not unusual for three to four years to elapse before the board releases a decision. Unfortunately, no quick and easy solution is available to the process under the present administrative system.

Finally, the disruption to the claimant's management is self-evident. To support the litigation, the claimant is forced to pull technical experts and professionals from other projects. This is the ripple effect of litigation on management operations.

For the government, the costs, delays, and disruption are equally as great. Clearly, the delay in getting decisions is identical to that encountered by the claimant and just as frustrating. Furthermore, funding the litigation is expensive in attorney work hours and resources devoted both to discovery and the hearing. In addition, securing funds to pay successful claimants, plus accrued interest, when the underlying project has long been completed is not always easy.

THE SEARCH FOR ALTERNATIVES

The U.S. Army Corps of Engineers in 1984 recognized these problems and decided to consider alternatives to the traditional method of resolving disputes before the boards of contract appeals. The goal was to develop a process that was quicker and less costly than a board proceeding. Several different dispute resolution methods were evaluated, including nonbinding arbitration and mediation. Expanding the number of personnel assigned to handling contract claims and appeals was also considered.

Increases in the number of judges and attorneys to handle government contract claims appeared to provide a simple answer; however, more employees was not a viable solution, since the government was in a period of personnel reduction. Therefore, in order to process contract claims and appeals in a timely manner, the Corps of Engineers had to consider innovative alternative dispute resolution (ADR) procedures.

The Corps of Engineers examined the mini-trial process, which was originally developed in 1977 to resolve a patent infringement suit.* After reviewing this ADR technique, it was decided to fully develop the concept to match the Corps' unique organization. The adapted mini-trial was then tested and evaluated in a pilot program. The result of the pilot program was the resolution of several complex contract claims in a matter of months. These claims most likely would have taken years to conclude had litigation been used. In addition, the mini-trial was inexpensive to use and the disruption to management was minimal.

CHARACTERISTICS OF THE MINI-TRIAL

The word *mini-trial* is really a misnomer, since the process is actually a structured negotiation process rather than a judicial proceeding. It blends characteristics from several dispute resolution sources—negotiation, arbitration, and mediation.

It is difficult to define a mini-trial. A definition has, however, been developed for its application in the Corps of Engineers. A mini-trial, in the Corps, is a voluntary, expedited, and nonjudicial process whereby the top management officials of each party meet to resolve a dispute.

Emphasized in this definition is, first, that the process is voluntary. Both parties must agree to use the mini-trial, and either may withdraw at any time without prejudicing its litigative position. Second, the process must be expeditious. The parties must commit themselves to an expedited procedure to realize the aforementioned benefits. Third, the mini-trial is nonjudicial. In contrast to traditional litigation, a mini-trial is not burdened by the formality and inflexibility of a judicial proceeding. And, finally, management officials of both parties meet to resolve the dispute, rather than having a third party, such as an attorney or a judge, take control of the process.

The general characteristics of a mini-trial are easy to understand. They expand on the basic definition and may be organized into five distinct elements. These characteristics include involving top management in the settlement process; limiting the time of the mini-trial; conducting an informal hearing; holding nonbinding discussions; and receiving comments from a neutral adviser. The parties should tailor each of the elements to achieve the best fit of the mini-trial to the dispute at issue. Remember, the mini-trial is a flexible process.

Top Management

The involvement of top management in the mini-trial is essential to the success of the process. Having top management decide the dispute, rather than attorneys and judges, enables the parties to utilize management skills and policies to resolve a dispute that is heavily fact-oriented.

These management officials should be from an organizational level higher than where the dispute arose. The reason for requiring the participation of this level of management is that the principals' deliberations and judgments should not be clouded by any previous involvement in the dispute.

At the mini-trial's informal hearing, the management officials will act as the "principal" representatives. To resolve the dispute at the mini-trial, it is critical that the principals have binding authority. They must be able to bind the parties without incurring additional delays by referring the dispute to third parties.

These principals must also have the technical expertise to understand

> **"A mini-trial . . . is a voluntary, expedited, and nonjudicial process whereby the top management officials of each party meet to resolve a dispute."**

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* See *Corporate Dispute Management* (Center for Public Resources, 1982), which discusses the evolution of the mini-trial concept from this patent suit.

the basic problems underlying the dispute. This is important, since the time frame of the process cannot accommodate educating the principals in the technical areas necessary to resolve the dispute.

Short Time Period

The mini-trial's duration must be short or it will degenerate into an alternative as costly and lengthy as litigation itself. In most cases, the process should be completed within one to three months, including the time for discovery and trial. Expressly limiting the scope of the discovery and the informal hearing is essential in order to complete the process in a short period of time. The parties should agree to limitations on depositions, interrogatories, and other discovery devices. Any problem encountered during discovery should be handled by the parties. As a last resort, the parties may agree to have the neutral adviser resolve any discovery problems.

As regards the amount of time the principal must commit to the process, it will be considerably less than the one to two months necessary to complete the mini-trial. Normally, attorneys acting as representatives for each party actually prepare the case for presentation to the principals. Since the principals will not be involved in the preparation of the case, their time commitment is much shorter. The parties may mutually agree to prepare the principals before the hearing by distributing position papers or other narrative materials. The parties should agree at the outset on a schedule with which they should thereafter strictly comply.

Informal Hearing

The actual hearing is informal and, typically, lasts only one or two days. Each party, usually represented by an attorney, presents its case to the principals. The length of time allowed for the presentation of the case and rebuttal is scheduled in advance and is strictly adhered to during the hearing. In keeping with the informal nature of the proceeding, no transcript of the hearing is produced and the rules of evidence and procedure are not enforced.

"... the disruption to the claimant's management is self-evident. To support the litigation, the claimant is forced to pull technical experts and professionals from other projects."

The proceedings are not adversarial, since the purpose of the informal hearing is to quickly inform the principals about the issues and positions underlying the dispute. The attorneys are allowed much flexibility in the manner in which they present their parties' position at the hearing. Witnesses, experts, position papers, documents, oral argument, and graphs and charts may all be used to quickly inform the principals about the dispute. No objections are permitted. Furthermore, witnesses are allowed to relate their testimony in a narrative form.

In keeping with the voluntary and cooperative nature of the mini-trial, the contents of the hearing are kept confidential. Neither party may use the hearing in subsequent litigation as evidence of an admission by the opposition.

Nonbinding Discussions

At the conclusion of the informal hearing, the principals meet privately to discuss the resolution of the dispute. During the meetings, the principals may break and consult with their staff. The staff, however, should not be included in the discussions, which are private and nonbinding. The parties are not required to reach agreement.

Neutral Adviser (Optional)

The last characteristic of the mini-trial is the use of a neutral adviser to assist the parties in assessing the merits of the claim. The use of such an adviser is optional. If the parties decided to use a neutral adviser in the hearing, however, they must clearly define that adviser's role. The neutral adviser may participate actively by questioning witnesses or passively by merely furnishing advice to the principals. The neutral adviser may also assist in establishing the hearing schedule and in controlling the discovery process. Furthermore, the principals may want to include the neutral adviser in the nonbinding discussions.

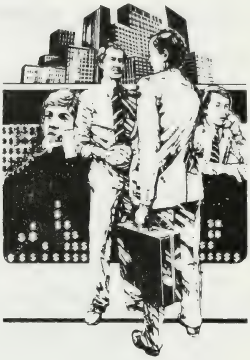
The neutral adviser's opinion concerning the merits of the claim may be oral or written, as specified by the parties. The parties must remember that the neutral adviser's opinion is advisory only. In any event, that opinion may not be used in later litigation. The parties should also provide for the confidentiality of the neutral adviser's opinions and prohibit him or her from acting as a consultant or witness concerning the dispute in subsequent litigation. Lastly, the expenses of the neutral adviser, as with all the costs associated with the mini-trial, should be split by the parties.

In selecting the neutral adviser, the parties should look for someone with considerable experience in government contracting and in litigation. Requiring government-contracting experience will eliminate the need to educate the neutral adviser about the technical details of the case and, thus, expedite the process, while litigation experience will enable the neutral adviser to offer reasoned opinions on how a board or court might resolve the case. Individuals so qualified may include former judges from boards of contract appeals and federal courts and also law professors.

APPROPRIATE CASES FOR MINI-TRIAL

Perhaps the most crucial part of the mini-trial process is the initial step of selecting appropriate cases. Each case must satisfy two prerequisites. Since the mini-trial process is voluntary, both parties must first agree to the use of the procedure. Second, an analysis should be performed to ensure that the purposes of the mini-trial (to avoid management disruptions and save money and time) will be realized. Obviously, claims involving small sums of money will usually not be attractive candidates for the process.

When selecting a case for mini-trial, the nature of the dispute must be considered. Cases involving areas of law which are unsettled are not appropriate for mini-trial. The principals involved in resolving the dispute will not be qualified to evaluate complex legal questions.



Appropriate cases should involve clear legal rules so that resolution of the factual issues will determine the outcome of the dispute. For example, the benefits contemplated by the mini-trial process will not be realized if the dispute involves issues that may only be resolved by a motion for summary judgment. In addition, an overriding consideration may dictate litigating the claim for a decision if the unresolved legal issue involves the establishment of important legal precedent.

Another factor affecting the decision whether to use a mini-trial is the volume of documentation necessary to litigate the dispute. Tracking and analyzing these documents will require a substantial expenditure of resources. Availability of lawyers, need for technical experts, and the expected length of the litigation must be factored into the analysis.

The timing of when to initiate the mini-trial procedure is also important in order to realize the benefits from the process. The facts and issues in the case selected should be sufficiently developed to permit a meaningful analysis. The Corps' experience has shown that the best time to consider the mini-trial is early in prehearing discovery, since the facts and issues have been somewhat developed but many of the costs of litigation have not yet been incurred.

"Having top management decide the dispute, rather than attorneys and judges, enables the parties to utilize management skills and policies to resolve a dispute that is heavily fact-oriented."

The most important criterion in case selection is probably that the parties want to resolve the dispute. Typically, it is not an all-or-nothing proposition. The parties must be committed to resolving the dispute with a minimum of expense, delay, and disruption.

MINI-TRIAL PROCEDURES

Corps of Engineers' Organizational Structure

The U.S. Army Corps of Engineers has issued an Engineers Circular, which provides guidance on the procedures to be used in conducting a mini-trial. The development of these procedures was shaped by the Corps' internal organization. An understanding of the managerial structure is important to fully appreciate how the mini-trial concepts are applied to a specific organization.

The Corps' organization consists of three levels of management. First, the individual district offices administer most of the contracts. The contracting officers, who award contracts and decide contractor claims, are normally found at this level. The division office acts as an intermediary level of management review for several districts. The final review in the Corps' system is at the headquarters in Washington, DC.

In selecting the top management official to represent the Corps, the internal organization was considered. In the Corps, the division engineer has review authority over the district's claims and appeals but usually does not have personal working knowledge concerning an individual claim. In addition, he or she usually has an extensive engineering background. Consequently, in the Corps' regulation, the division engineer was designated to represent the Corps as its principal. In order to be able to bind the Corps, the division engineer was given contracting officer authority and the discretion to select cases for mini-trial.

Since the division engineer can decide to use a mini-trial to resolve a specific dispute, the claimant may make a direct request for a mini-trial. Within the Corps, the division engineer has absolute discretion to determine whether to use a mini-trial.

When the division engineer offers the claimant an opportunity to resolve the dispute through a mini-trial, it must be clearly indicated that participation in this process is voluntary and will not prejudice the claimant's appeal before the board of contract appeals. The division engineer also describes the procedure to the claimant and states that a written agreement is necessary to outline the procedures used for the mini-trial.

Mini-Trial Agreement

A written agreement between the parties forms the foundation for a successful mini-trial. The mini-trial agreement should specify the names of the principals, identify the issues in controversy, and state the name and role of the neutral adviser, if one is to be used.

The agreement should also allocate the expenses of the proceeding between the parties, outline the discovery process, and establish time schedules. The dates and times for discovery, hearing, and discussions commencing after hearing should all be specified. By stipulating time schedules in the mini-trial agreement, the parties plan and commit to conducting the mini-trial in a timely fashion. The agreement discourages the tendency to postpone events necessary to complete the process.

Since the mini-trial is a nonjudicial proceeding, the adjudication of the appeal will continue unless the parties take some action to suspend the litigation. The parties should, therefore, file a motion with the appropriate board of contract appeals to postpone the proceedings. The mini-trial agreement may expressly provide for the joint filing of such a motion.

Discovery

After the mini-trial agreement is finalized, the parties will engage in discovery, as outlined in the agreement. The parties may want the mini-trial discovery to be on the record for use in subsequent proceedings in the event the mini-trial is not successful. To save time, the parties should limit the time and scope of discovery in the mini-trial agreement. For example, the parties may limit the number and time for depositions and specify the number of interrogatories that each party may submit. As explained earlier, the mini-trial agreement should set the time for completion of discovery. It is recommended that the parties complete discovery at least two weeks prior to the hearing.

Prehearing Matters

At the conclusion of discovery, the parties should exchange written position papers, witness lists, and exhibits, as well as finalize any stipulations for the hearing. The mini-trial agreement should specify the length, scope, and format of the position papers. In addition, the mini-trial agreement should require the claimant to submit an analysis of the requested damages, since the parties will discuss both entitlement and damages. Another subject to clarify at this time is the role of the neutral adviser at the hearing. The parties may want the neutral adviser to actively participate in asking questions of witnesses and controlling the time schedule.

Hearings

At the meeting held in advance of the mini-trial, the parties should specify all the details concerning the informal hearing. Generally, the hearing should not exceed two days. The mini-trial agreement will state the exact time of each presentation and the order of presentation. If the process is to succeed, the parties must strictly adhere to the time limits. The testimony will not be sworn and no transcript or record of the hearing will be made. The principals and the neutral adviser should be allowed to examine the witnesses. Closing statements by the attorneys should be made, since the principals meet immediately after the hearing to begin discussions.

When the principals discuss resolution of the dispute after the hearing is completed, this meeting should be private, but the neutral adviser may be included. Should the principals desire additional factual information, the attorneys may again examine the witnesses in the presence of the principals and the neutral adviser. Because the process is flexible, consideration of this evidence is allowed after the hearing.

Termination and Confidentiality

Two final points should be emphasized. First, either party may withdraw at any time during the proceedings. From the time an offer of a mini-trial is extended to the claimant until the conclusion of the final discussions between the principals, either party may refuse to continue with the process without in any way prejudicing its case. This is consistent with the voluntary nature of the pro

"Ideally, the mini-trial provides both parties with the opportunity to resolve their dispute short of incurring the costs, delays, and disruptions that would result from litigation."

ceeding. Second, evidence presented at the mini-trial will remain confidential and will not be used in subsequent litigation, unless the parties have agreed otherwise. Mini-trials, therefore, are of little risk to the parties, since the discussions are confidential and either party may withdraw at any time.

CORPS OF ENGINEERS' MINI-TRIAL EXPERIENCE

In its first attempt at a mini-trial, the U.S. Army Corps of Engineers successfully resolved a contract claim that was pending before the Armed Services Board of Contract Appeals (ASBCA). The mini-trial involved an acceleration claim in the amount of $630,570 by Industrial Contractors, Inc. The principals resolved the claim in less than three days, and the dispute was settled for $380,000. At the mini-trial, the government was represented by the Corps' South Atlantic division engineer, while the contractor was represented by its president. The neutral adviser was Judge Louis Spector, retired senior claims court judge from the U.S. Claims Court.

The Corps' second mini-trial involved a dispute arising out of the construction of the Tennessee Tombigbee Waterway. The $55.6 million (including interest) claim involving differing site conditions was filed at the Corps of Engineers Board of Contract Appeals by Tenn-Tom Constructors, Inc., a joint venture composed of Morrison-Knudsen, Brown & Root, and Martin K. Eby, Inc. A vice-president for Morrison-Knudsen acted as principal for the joint venture, and the Ohio River division engineer represented the government. Professor Ralph Nash of George Washington School of Law was the neutral adviser. Following a three-day mini-trial (June 12–14, 1985) and a follow-up one-day mini-trial (June 27, 1985), the principals agreed to settle the claim for $17.2 million, including interest.

In addition to the two successful mini-trial experiences, the Corps has been able to settle several other contract appeals as a result of the mini-trial program. When the Corps was considering the use of a mini-trial in these other appeals, the parties settled the dispute. The concentrated review of these appeals greatly facilitated the settlement.

Obviously, the parties reap the benefits of the mini-trial if the dispute is resolved. Experience seems to indicate, however, that the parties will benefit from the mini-trial process even if the dispute is not resolved. At the very least, the mini-trial process will force the parties to clearly formulate the issues early in the process, marshal all the relevant evidence, and better prepare the attorneys to present the case to the board of contract appeals.

CONCLUSION

Ideally, the mini-trial provides both parties with the opportunity to resolve their dispute short of incurring the costs, delays, and disruptions that would result from litigation. At the least, the mini-trial forces the parties to assess their respective positions early in the litigative process.

The Corps of Engineers' mini-trial program has been adjudged a success both within the government and the private sector. It is to be hoped that there will be an increasing number of successful mini-trials in the future and, as a result, the government will be saved from the costs and delays associated with litigating contract disputes. Furthermore, the Corps will continue to explore other dispute resolution procedures. ■

POINTS ON A CONTINUUM:
DISPUTE RESOLUTION PROCEDURES AND THE ADMINISTRATIVE PROCESS

Philip J. Harter
June 5, 1986*

This report was prepared for the Administrative Conference of the United States. The views expressed are the author's alone and do not necessarily reflect those of the Conference, its Committees, or staff. Portions of the report were revised prior to publication to reflect subsequent developments in the case law.

VIII
MINITRIALS

Its creators called it an "information exchange", but a New York Times headline writer in August 1978 found "mini-trial" to be more descriptive and the name stuck. The writer was reporting the quick settlement procedure designed by lawyers to untangle years of litigation in a patent case involving TRW, Inc. and Telecredit, Inc.[237]

The minitrial is a flexible, voluntary alternative means for the resolution of complex disputes successfully used by businesses, governments, and various interest groups. The minitrial was developed with the guiding hand of the Center for Public Resources, a non-profit organization formed in 1979 by a group of general counsel of well known Fortune 500 corporations. The new procedure has made advances in commercial and consumer dispute contexts where reduction in litigation expense is a major goal, and the idea has begun to spread to a wider segment of the bar including the government contract field. NASA, the government pioneer in the program, used a minitrial procedure to settle a multimillion dollar satellite contract dispute with Spacecom and TRW.[238] The Justice Department has run a minitrial pilot program in certain military procurement cases, and the Army Corps of Engineers has established a pilot minitrial program in several of its regions.

Minitrial Procedure.

The minitrial, sometimes referred to as a mini-hearing to indicate the relatively informal nature of the process, is a highly abbreviated litigation process in which litigants present the heart of their case to senior officials of the other party who have authority to settle. "The primary purpose of the minitrial is to

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236. What should be minimally required must necessarily depend on the nature of the questions to be resolved. Thus, they process will depend on the subject matter.

237. "Alternatives to the High Cost of Litigation", CPR, N.Y., N.Y., Special Issue 1985, p. 3.

238. 44 Federal Contracts Report 589.

set a stage and create a momentum for settlement."[239] Typically the process involves the "exchange of briefs or position papers with supporting documents, oral presentations of facts and law to senior officials of the opposing parties, some opportunity for questioning, and negotiation by the senior officials to attempt to settle the dispute."[240] An advantage of the minitrial is that it focuses the attention and energy of executives on both sides of the dispute and forces them to participate directly in the negotiated settlement. Another desirable feature of the minitrial is its flexibility: the parties can tailor the essential elements of the procedure to fit the litigation at hand.

Parties are motivated to adopt the minitrial procedure by several factors--avoidance of high litigation costs, avoidance of adverse outcomes of litigation, the need to return employees supporting the litigation to more productive activities, and the desire to maintain a reasonably cordial relationship between litigants who may wish to continue doing business together in the future.[241]

The parties typically negotiate the groundrules at the outset and often suspend or curtail discovery. This would suggest to parties, who have an eye on the possibility of suspending normal litigation and attempting the minitrial, to make a careful schedule of depositions.[242] Because the minitrial may be elected before the end of discovery, the parties should depose those individuals whose testimony will have the most substantial impact.[243]

The minitrial is wholly voluntary so the parties must genuinely want to see it used as a means of settlement for it to succeed.[244] Obviously the threshold question for the parties to consider is whether the nature of their dispute lends itself to the mini-hearing process.[245] One of the developers of the minitrial offered the following observation on the decision of whether to use the process:

> It may not be appropriate where precedent-setting issues of law and witness credibility are the central issues and where the client has made a business determination to roll the dice. It can, however, be tailored to fit most large scale disputes involving mixed questions of law and fact, particularly where issues of science and technology are important. For most large, entrenched cases, the minitrial offers a better alter-

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[239] Minitrial Successfully Resolves NASA-TRW Dispute, The Legal Times, Monday, September 6, 1982, p. 17.

[240] Parker, Douglas M. and Phillip L. Radoff, The Mini-Hearing: An Alternative to Protracted Litigation of Factually Complex Disputes, 38 The Business Lawyer 35, November 1982.

[241] Minitrial supra 239 at 17.

[242] Id.

[243] "Alternatives to the High Cost of Litigation", CPR, N.Y., N.Y., Special Issue 1985, p. 3.

[244] Parker and Radoff, supra note 240 at 42.

[245] Olson, Dispute Resolution: An Alternative for Large Case Litigation, 6 A.B.A. Litigation Sec. J. 22 (1980). cited in Parker and Radoff, supra note 240 at 42.

native to the more common practice of one side and then the other occasionally tossing out a settlement offer.[246]

Two obviously related questions to consider are whether one side will have gained a tactical advantage if settlement is not reached and what point in the litigation process will be the most appropriate to conduct the minitrial.[247] Parties should consider that despite a failure in settlement following the minitrial, the process itself aids the parties in preparing and focusing the issues of their cases for future full-blown litigation.

If the parties decide to use the minitrial, an important consideration is whether to use a neutral advisor to moderate the discussion.[248] Most, but not all, minitrials employ a neutral advisor with special expertise (often a retired judge) to "supervise the discussion and to furnish the parties with a nonbinding evaluation of the most likely outcome of the dispute were it to wind up in court."[249] In cases of highly technical disputes, some parties have found that the introduction of a neutral advisor causes additional expense and possible delay because the advisor must become sufficiently educated.[250] In the NASA case explained below, for example, the parties never seriously contemplated using a neutral advisor.[251]

Relatively short written briefs discussing the applicable facts and law are usually exchanged prior to the minitrial.[252] More comprehensive briefs are sometimes helpful or necessary in narrowing the issues in advance of oral presentations.[253] In the NASA case, for example, the briefs were rather lengthy and also were followed by a simultaneous exchange of written questions to be responded to at oral presentation.[254]

The hearing itself usually lasts no more than two days for the parties to state their cases (excluding extraneous issues), offer evidence for their positions, and field questions.[255] Presentations can be made by lawyers, technical experts, or a combination of both.[256] At the conclusion of the hearing, the negotiating officers go off on their own to settle the dispute, with legal advisors standing by for consultation. If they reach an impasse, and have proceeded before a neutral advisor, the parties can request an advisory opinion on the likely outcome. The advisory opinion often acts as a catalyst towards settlement.[257] With or without a neutral advisor, any deadline set by the parties can contribute to lending a sense of urgency to resolving the dispute.[258]

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[246] Parker and Radoff, supra note 240 at 42.

[247] Id. p. 35.

[248] Id. p. 43.

[249] "Alternatives to the High Cost of Litigation", CPR, N.Y., N.Y., Special Issue 1985, p. 3.

[250] Parker and Radoff, supra note 240 at 43.

[251] Id.

[252] Id.

[253] Id.

[254] Minitrial supra note 239 at 13.

[255] Alternatives to the High Cost of Litigation, CPR, N.Y., N.Y., Special Issue 1985, p. 3.

Use by Government Agencies.

The growing movement in corporate and consumer disputes to save time, money, and judicial resources through alternative dispute resolution techniques -- such as minitrials -- has slowly reached the government setting.[259] Exploration of the new technique should be helpful since the government has experienced the same rising litigation costs and interminable court delays as private parties. Several perceived statutory and practical obstacles have impeded the government in using creative dispute resolution methods, however. The minitrial may be particularly well suited to overcome these obstacles.[260]

One obstacle which makes government contract disputes distinct from commercial litigation is the elaborate disputes resolving statutory procedure mandated by the Contract Disputes Act of 1978.[261] The statute applies to all contracts entered into after March 1, 1979. A key provision of the statute mandates that all government contracts include dispute clauses which set forth procedures by which disagreements relating to the contract must be resolved.[262] The procedure requires the government to make a final written decision concerning the disagreement with the contractor including all the facts and legal conclusions which led the government to deny the contractor's claim.[263] Upon receipt of the government's final decision, the contractor has three options: (1) acquiesce; (2) appeal the decision to an agency board of contract appeals; or (3) sue in the U.S. Claims Court.[264]

Whether these statutory procedures are exclusive is a question which raises an impediment to the government's use of the minitrial technique.[265] For example, in Davis and Moore,[266] the Interior Board of Contract Appeals held that the government cannot submit to binding arbitration because of conflict with the statutory procedures.[267] The government's authority to settle and to devise means of settling, however, has never been doubted because in fact a basic purpose of the Contract Disputes Act was to promote more efficient resolutions of disputes.[268]

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[256] Parker and Radoff, supra note 240 at 43.

[257] Cong. Rec. S14707 (November 1, 1985).

[258] Parker and Radoff, supra note 240 at 44.

[259] Crowell and Moring Discussion Paper, Alternative Resolution of Government Contract Disputes, p. 1.

[260] Minitrial supra note 239 at 21.

[261] 41 U.S.C. §§ 601-613 (Supp. IV 1980).

[262] Minitrial supra note 239 at 19.

[263] Id.

[264] Id.

A second serious obstacle facing government use of expedited settlement is "the natural inclination of agency officials to follow the book, in resolving disputes, thereby theoretically avoiding congressional and public criticism."[269] A plethora of organizations outside the agency review and second-guess any settlement. Potential reviewers and possible critics include oversight committees of Congress, audit teams from the General Accounting Office, and the agency inspectors general,[270] as well as the general public. The use of minitrials may actually ease this problem, however. The process requires a written record clearly documenting the issues of settlement, potential litigation risks are clearly described by the legal positions set forth in the briefs, and the formality of the procedure itself may lessen criticism."[271]

A third perceived constraint unique to the federal contracts context is the question of settlement authority. Federal agencies have a rigid chain of command and settlements must often be approved by the legal, financial, procurement policy, and technical divisions of an agency.[272] Tentative settlements are often upset by subsequent internal agency review. The minitrial procedure may also obviate much of this problem. In preparation for the minitrial, the government is forced to define the authority of the negotiation and the acceptable negotiating position. The advance approval and "written authorization from the head of the agency, empowering the representative on behalf of the agency to reach a settlement, reduces the opportunities for overturning the settlement."[273]

Finally, a related problem for the government is the question of settlement funding requirements.[274] A negotiating officer for the agency obviously cannot ultimately make settlement without the funds to cover it. Minitrial requirements in some ways relieve these problems by involving senior officials who have the authority to approve "re-allotments".[275] Re-allotments can be made within the agency to cover the financial needs for a particular settlement.

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[265] Id.

[266] IBCA No. 1308, 81-2 BCA 91 15,418.

[267] Minitrial supra note 239 at 21.

[268] Id. S. Rep. No. 3173. 95th Cong., 2nd Sess. 119781.

[269] Crowell and Moring, p. 1.

[270] Minitrial Successfully Resolves NASA-TRW Dispute, The Legal Times, Monday, September 6, 1982, p. 21.

[271] Id.

[272] Id.

[273] Id.

[274] Crowell and Moring, supra note 259 at 6.

Despite the putative obstacles mentioned above, the government has already begun exploring alternative dispute resolution ("ADR") techniques, such as minitrials, because of several factors relating to litigation, some unique to government and some particular to all litigants.

The most obvious catalyst for exploration of alternative resolution techniques is the rising cost of litigation and the court delays which face all private parties and with perhaps even greater force the government.[276] Disputes between agencies and their suppliers has been the natural result of an increase of federal procurement spending.[277] In fiscal year 1982, for example, 1,273 cases were filed with the Armed Services Board ("ASBCA"), the largest administrative board of contract appeals, while only 974 cases were filed the previous year.[278] Only 95 of the 1,594 pending cases in 1982 were being processed under optional expedited procedures.[279] Although the administrative appeals boards were designed as a streamlined alternative to court litigation, the costs are still substantial because of the formal procedures adopted by the boards.[280] Minitrials have resulted in substantial savings for the parties. In the NASA case, which was the first minitrial used in the context of government procurement, one estimate suggested that the savings "were probably more than $1 million in legal fees alone."[281]

Another factor making the minitrial particularly attractive to the government is related to the required procedures of the Contract Dispute Act of 1978 itself. The required disputes clause in government contracts requires that federal suppliers continue performance, notwithstanding a dispute with the government. The contractor may not stop work and immediately challenge in court an agency order or contract interpretation.[282] Another mandatory clause in all government contracts, the "changes clause", also allows the government to insist upon changes to the contract during performance.[283] Those allowable government changes would of course be considered breaches of contract in a commercial setting.[284] In exchange for those two conditional clauses, the government must pay a fair amount for additional work.[285] Problems arise, however, when the government does not consider one of its directions as being a "change" in the contract. The contractor must continue to perform and leave for later the question of who will bear costs.[286] An efficient, expedited resolution of the dispute by minitrial settlement will lessen the adversarial roles between the government and its supplier -- "a phenomenon that serves the ongoing business relationship of the parties to government contracts."[287]

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[275] Minitrial supra note 239 at 21.

[276] Crowell and Moring, supra note 259 at 2.

[277] Id.

[278] Id.

[279] Id.

[280] Id., at 3.

[281] Eric D. Green, Boston University Law School Professor in 44 Federal Contracts Report 591, September 23, 1985.

[282] Crowell and Moring, supra note 259 at 4.

[283] Id.

[284] Id.

When and for Which Cases, Should the Government Consider Using Minitrials?

In its pilot program for using minitrial techniques to resolve disputes, the Justice Department has directed government attorneys that cases selected for minitrial should be at an early stage of litigation.[288] The cost savings of a minitrial held after discovery has already been completed may not be significant.[289] In addition, the case should probably involve more than $250,000 to justify expenditure of at least a full day's time of high-level company executives and government officials.[290]

The minitrial technique lends itself well to cases involving highly technical concepts and disputes involving mixed questions of law and fact.[291] The NASA case was a good candidate to test the minitrial for this reason. The government also may wish to consider using the minitrial method in cases involving classified defense contracts. The informal settlement can be conducted without an evidentiary hearing in open court that might be harmful to the national security.[292]

The minitrial is likely less appropriate where witness credibility is a major factor. The technique is also probably not justified in cases where questions of law can quickly be resolved through summary judgment.[293] Finally, the minitrial would not be extremely effective for the government in litigation undertaken to implement policy.[294]

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[285] Id.

[286] Id.

[287] Minitrial Successfully Resolves NASA-TRW Dispute, The Legal Times, Monday, September 6, 1982, p. 19.

[288] 44 Federal Contracts Report 591.

[289] Id., at 589.

[290] Id., at 590.

[291] Id.

[292] Crowell and Moring, supra note 259 at 8.

[293] Id.

[294] Oliver, Dale E., Crowell and Moring, Alternative Dispute Resolution in Government Litigation; Remarks before the First Judicial Conference of the United States Court of Appeals for the Federal Circuit, p. 1.

The following is a brief review of two government cases successfully resolved through use of minitrial techniques.

NASA Minitrial.

The first reported use of the minitrial technique to resolve a government contracts dispute was in 1982 when NASA, Space Communications Co. (Spacecom -- prime contractor), and TRW, Inc. (TRW -- the subcontractor) settled a multi-million dollar technical dispute.[295] The dispute involved one of NASA's communications satellite programs.

Nature of the Dispute. In December 1976, NASA awarded a major satellite contract to Spacecom for the production of a tracking and data relay satellite system (TDRSS) and related services to be provided over a ten year period.[296] The satellites were to be deployed in orbit by a space shuttle and provide a telecommunications link to an earth station.[297] The contract had an initial price of $786 million.[298]

TRW, Inc., the principal subcontractor, was responsible for providing system engineering, building the communication satellites and providing the necessary software.[299]

By the fall of 1981, the commencement of the TDRSS services had been rescheduled because of delays in production of the space shuttle; the contract price had nearly doubled because of the delays and program changes; and several contract disputes had arisen between Spacecom and NASA.[300] The disputes, ultimately resolved by the minitrial, arose when NASA issued two letters of direction to the contractors in early 1979. The letters sought to obtain for NASA certain capabilities that it believed were within the scope of the contract.[301] Spacecom and TRW maintained that the instructions constituted new work which entitled them to increased compensation.[302] Spacecom and TRW appealed the final decision of the contracting officer to the NASA Board of Contract Appeals. The consolidated appeal was one of the largest ever filed with the Board.[303] These appeals commenced the litigation.

Scope of Litigation. The litigation involved a series of complex issues relating to the interpretation of the TDRSS performance specification in a variety of highly technical respects.[304] "The merits of the issues involved intricate questions of computer capability, electronics, and the laws of orbital mechanics, as well as traditional questions of contract interpretation."[305]

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[295] 44 FCR 590.

[296] Minitrial supra note 239 at 13.

[297] 44 FCR 590.

[298] Parker and Radoff, supra note 240 at 37.

[299] Minitrial supra note 239 at 13.

[300] Parker and Radoff, supra note 240 at 37.

[301] 44 FCR 596.

[302] Minitrial supra note 239 at 13.

[303] 44 FCR 596.

The complaint and answers were filed in September 1979 and February 1980, respectively.[306] Shortly after discovery began, the parties suspended the proceedings for three months to pursue traditional settlement negotiations.[307] Settlement failed. The parties renewed litigation and engaged in massive document discovery involving the reproduction of approximately 33,000 pages of government files and 72,000 pages of the contractors' files.[308]

Depositions commenced in the summer of 1981.[309] Although the contractors sought 11 depositions and the government sought 43, only 5 depositions actually took place.[310] By September, the highly technical examinations of the witnesses "consumed 3100 pages of transcript."[311] The widening scope of discovery required the Board to push back the hearing date several times and it was estimated that trial was still at least a year away.[312]

In the fall of 1981, Spacecom approached NASA with the suggestion to undertake settlement discussion again. The parties agreed on a minitrial after certain preconditions were set by the parties: (1) the contractors would submit a cost proposal with a breakdown of the six major issues of appeal; (2) each side would give written authority to settle to an appointed negotiator; (3) deadlines and rules of conduct would be agreed upon; and (4) discovery would be suspended during the minitrial.[313]

Motivations to use the Minitrial. First, both parties were concerned with costs. They had already found it necessary to conduct detailed discovery and anticipated substantial additional discovery. The parties had proposed calling for the depositions of forty-five additional government and contractor witnesses over the next ten months.[314]

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[304] Parker and Radoff, supra note 240 at 37.

[305] Id., p. 38.

[306] Id.

[307] Minitrial supra note 239 at 13.

[308] Parker and Radoff, supra note 240at 38.

[309] Id.

[310] Minitrial supra note 256 at 13.

[311] Parker and Radoff, supra note 240, at 38.

[312] Minitrial supra note 239 at 13.

[313] Id., p. 13.

[314] Parker and Radoff, supra note 240 at 38.

Second, the parties were motivated to tighten the schedule. A trial date was not even in sight with delays attributable to the complexities of the case, problems in coordination between the prime and subcontractor, the difficulty of securing people for litigation who were also needed in the TDRSS program, and the shortage of people allocated to the case by the government.[315]

A third concern of both NASA and the contractor was the uncertainty of result. Both parties were aware that the difficulty of making a clear, comprehensive and persuasive presentation of such complex issues created an unusual uncertainty in the outcome.[316]

Another motivation for the minitrial was the parties' need for continued cooperation. Litigation can strain business relations between parties. In this case, the parties were required to continue working together to deploy the satellite successfully, a national asset. They also wanted to release key personnel from the litigation process to resume channelling their energies into the program.[317]

Finally, the parties felt the need to address the merits and involve senior officials. Spacecom realized that previous settlement discussions had not addressed the merits of the issues nor involved face-to-face meetings of senior management.[318] It felt that NASA's willingness to invest such time and money into discovery suggested that NASA was persuaded that the government's case was meritorious.[319] The contractors felt that a settlement could only be reached if, through a minitrial, senior management of NASA was exposed to the contractor's best case and both parties were able to address the merits.[320]

The Procedure. Before proceeding, the parties agreed that:

- Litigation would be stayed during the minitrial,[321] but would resume if no settlement were reached.

- The contractors would submit a formal claim covering cost of performance and proposed allocation of cost of each legal issue.[322]

- The parties would simultaneously exchange briefs setting forth their factual and legal positions. All cited documents were to be included in appendices.[323] No reply briefs would be filed.

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[315] Crowell and Moring, supra note 259 at 8.

[316] Parker and Radoff, supra note 240 at 39.

[317] Id.

[318] Id.

[319] Id.

[320] Id.

[321] Id., p. 40.

[322] Id.

- Shortly after the briefs were exchanged, each party would submit questions to be addressed by the other during its oral presentation.[324]
- The trial was to be one day. Each side was to have three hours to make a presentation and could use whatever combination of lawyers and engineers it thought appropriate in making the presentations.[325]
- Presentations were to be made to senior officials representing each party. An associate administrator of NASA and the director of Goddard Space Flight Center for NASA; a VP of TRW and the president of Spacecom, for the contractors. Only senior officials would ask questions.[326]
- Settlement negotiations would then begin.

In the actual minitrial, the oral presentations were made exclusively by lawyers.[327] Also, the parties chose not to use a neutral advisor because of the complex technical issues in dispute.[328]

Settlement negotiations began the day after the hearing "behind closed doors" at NASA headquarters.[329] Only the four principal negotiators directly participated in the negotiations but had advisors and legal counsel stand by to discuss positions.[330] The parties had agreed to a groundrule of limiting the settlement negotiations to a single day but decided that an additional day was justified by the progress made. The parties settled after their second day of face to face meetings and reached agreement on the claim as well as unrelated disputes.[331] All claims and related issues amounted to well over $100 million.[332]

Army Corps of Engineers Use of the Minitrial

In the last two years, the Corps of Engineers has used the minitrial procedure twice to resolve construction contract claims.[333] Spokesmen for the Corps have said that the type of case most suited for a minitrial is one involving a "highly complex factual dispute in which the contractor's arguments have some merit."[334] The Corps looks for cases in which there is a possibility that a board of contract appeals will sustain the contractor's position where there is room for the government to settle.[335]

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[323] Id. NASA submitted a 64 page brief with a 43 document appendix, while the contractor's brief consisted of 81 pages and an appendix of 79 documents.

[324] Minitrial supra note 239 at 13.

[325] Id.

[326] Id.

[327] Id.

[328] Crowell and Moring, p. 10.

[329] Parker and Radoff, p. 41.

[330] Minitrial supra note 239 at 17.

[331] Id.

[332] Id.

Industrial Contractors. The Corps first used the minitrial to reach settlement on a $630,000 construction contract claim.[336] The claim was made by Industrial Contractors, Inc. that the government had "improperly accelerated performance on its construction contract."[337] The parties agreed to use a minitrial. The contractor's president and the Corps' division engineer each presented his claim in three and one half hours.[338] Following an appraisal of their cases by a neutral advisor, former Claims Court Judge Louis Spector, the parties settled after 12 hours of negotiation.[339]

Tenn-Tom. The second case in which the Corps successfully used the minitrial technique to resolve a dispute involved a $61 million construction claim by Tenn-Tom Construction.[340] The Corps awarded a contract to construct part of the Tennessee-Tombigbee Waterway, to Tenn-Tom, a joint venture of Morrison--Knudsen Co., Brown and Root, Inc., and Martin Eby Construction Co.[341] The contract was for excavation of 95 million cubic yards of earth.[342] The dispute arose when the contractor sought a $44 million equitable adjustment based on alleged differing site conditions. The contractor had experienced performance difficulties because of drainage problems on site.[343] After receiving written denial of the claim by the contracting officer, the joint venture appealed to the Corps of Engineers Board of Contract Appeals,[344] increasing the claim to $61 million due to interest.

The parties agreed to a minitrial and chose Professor Ralph Nash, a GW

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333. 44 FCR 502; 43 FCR 257.

334. 44 FCR 502.

335. Id., p. 503.

336. 43 FCR 257 in Id.

337. Id.

338. Id.

339. Id.

340. In Re Tenn-Tom Construction, memorandum of settlement agreement, 8/23/85. 44 FCR 502.

341. 44 FCR 500.

342. Id.

343. Id.

344. Id.

professor, as a "neutral advisor."[345] The trial was held in Cincinnati on June 12-14, 1985.[346] The principal officers for the parties were J. K. Lemley, Senior Vice President of Morrison-Knudsen, for the contractors, and Division Engineer Brig. Gen. Peter J. Offringer, for the Corps.[347] The parties presented their cases on consecutive days, with a third day devoted to presentation of evidence concerning quantum and for remaining questions.[348] By agreement, the parties reconvened on June 27, for presentation of further evidence and more questions. They settled the next day.[349] The government agreed to pay Tenn-Tom $17.25 million in exchange for a release of all prime contractor and subcontractor claims under the contract.[350]

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[345] _Id._ at 503.

[346] _Id._

[347] _Id._

[348] _Id._

[349] _Id._

[350] _Id._

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REPORT OF SUBCOMMITTEE ON ALTERNATE MEANS OF DISPUTE RESOLUTION COMMITTEE ON CORPORATE COUNSEL

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July 1, 1986

The Effectiveness Of The Mini-Trial In Resolving Complex Commercial Disputes: A Survey*

In recent years, one of the most popular forms of alternative dispute resolution employed in large, complex cases has been the mini-trial. The mini-trial is a method of structuring a case for settlement which generally involves a nonbinding information exchange conducted before representatives of disputing parties with settlement authority who then meet to negotiate a settlement. It was created in the late 1970's by lawyers who were attempting to resolve a complex patent infringement case between Telecredit and TRW, and has been used with increasing frequency since that time, particularly by large corporate clients in disputes with parties with whom they have ongoing commercial relationships.[1]

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* The Subcommittee on Alternate Means of Dispute Resolution gratefully acknowledges the substantial assistance of Eric Ordway, an associate at Weil, Gotshal & Manges, in the preparation of this report.

[1] Descriptions of the Telecredit/TRW mini-trial may be found in Green, Marks and Olson, "Settling Large Case Litigation: An Alternative Approach", 11 Loy. L.A.L. Rev. 493 (1978) and Davis, "A New Approach to Resolving Costly Litigation", 61 J. Pat. Off. Sec'y 482 (1979). For a comprehensive description of the mini-trial as a tool for alternate dispute resolution authored by one of the originators of the concept _see_ Green, Eric D. (editor) _CPR - Legal Program Mini-Trial Handbook_, (Matthew Bender & Co. 1982) and Green, "Growth of the Mini-Trial,"9 Litigation 12 (Fall 1982). _See also_ Fine, Ericka S., _CPR - Legal Program Mini-Trial Workbook_, (Center for Public Resources 1985) (hereinafter _"Mini-Trial Workbook"_); Henry, James F. "Mini-Trials: An Alternative to Liti-
(footnote continued)

Over the past year, the Subcommittee on Alternative Means of Dispute Resolution of the Committee on Corporate Counsel of the Litigation Section of the ABA conducted a survey in which it polled the views of numerous attorneys who had participated in mini-trials (hereinafter the "ABA Survey"). Each attorney polled in the ABA Survey was asked to describe the nature of the dispute which was the subject of the mini-trial, as well as the participants in, and the format and results of the process. Attorneys were also asked generally to comment on the advantages and disadvantages of the mini-trial.

The ABA Survey consisted of interviews with nineteen attorneys and one former judge regarding twenty-eight actual or proposed mini-trials (several of the persons interviewed were involved in more than one mini-trial; three of the mini-trials never took place). Five of the attorneys interviewed were outside attorneys; the others were inside attorneys for large corporations; the former judge was affiliated with a law firm.[2] The ABA sample revealed considerable

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gation,"1 Negotiation Journal 13 (January 1985); Parker, Douglas M. and Radoff, Phillip L., "The Mini-Hearing: An Alternative to Protracted Litigation of Factually Complex Disputes," 38 Bus. Law 35 (Nov. 1982); "Use of Mini-Trial Seeks to Ease Burden of Corporate Litigation," The Washington Post (Oct. 13, 1985).

[2] It should be noted that because some of the attorneys (footnote continued)

variety with respect to types of actions and size of damage claims. Sixteen of the mini-trials surveyed involved straight contract actions, five involved product liability claims and four involved patent disputes. Of the remaining three Survey mini-trials, one involved an employee grievance, another a simple negligence claim, and a third a dispute over insurance coverage. At least three of the mini-trials involved damage claims of over $30 million (one was for $30 million, the other two for $40 million); six mini-trials involved damage claims between $1 million and $10 million; six others involved damage claims ranging from $100,000 to $500,000.[3] Additionally, as demonstrated below, there were substantial differences with respect to format, setting, and method of decision-making from one Survey mini-trial to another.

This report incorporates the results of the above ABA Survey, as well as other current information about the mini-trial as a device for resolving disputes. The report also provides some recommendations as to how to evaluate the suitability of disputes for mini-trials and how to deal with

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were subject to confidentiality provisions in their mini-trial agreements, they were unable to provide answers regarding certain aspects of the mini-trials in which they participated.

[3] Various attorneys interviewed did not disclose the dollar value of the damage claims at issue in their mini-trials.

some of the problems inherent in the mini-trial. In the course of preparing this report, committee members reviewed numerous mini-trial materials, including sample mini-trial agreements, neutral advisor engagement letters, summaries of mini-trials and mini-trial formats. A sampling of these materials has been included in the Appendix to this report.

I. Elements of the Mini-Trial

A. General

Ever since the mini-trial was first used, its popularity has been based on a combination of various attributes, including speed, cost-effectiveness, flexibility, and confidentiality.[4] Perhaps the most important of these attributes are speed and cost effectiveness. Mini-trials usually last several days, or on rare occasions a few weeks, and require, at most, a few months of preparation. Thus, they often result in substantial savings on litigation costs. Additionally, most corporate clients believe that the settlements which result from mini-trials are usually superior to the results achieved at trial for comparable cases. Mini-trials can also be tailored to the demands of the parties and can be kept confidential by means of special confidentiality agreements.

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[4] Other acknowledged attributes of the mini-trial include the following: narrowing the issues in a dispute by eliminating overly technical and/or collateral considerations which may obscure the core problem; preventing unnecessary diversions of executive time and energy; and preserving ongoing business relationships. See Fine, Mini-Trial Workbook, supra at 2-3.

To ensure the use of the mini-trial as the initial means of resolving a dispute, parties to a contract can insert a provision in the contract which requires them to submit their disputes to a mini-trial before pursuing litigation. Such agreements have been looked upon with favor by at least one court and appear to be enforceable. See AMF Inc. v. Brunswick Corporation, No. Civ-85-2743 (E.D.N.Y. November 4, 1985) ("General public policy favors support of alternatives to litigation when these alternatives serve the interests of the parties and of judicial administration").

B. The Agreement

1. Formal or Informal -- An important element in setting up a mini-trial is the mini-trial agreement. In many successful mini-trials,[5] the agreement is a detailed written instrument which lays out the procedures, identity of the participants and effect of the mini-trial (Sample mini-trial agreements are contained in the Appendix). Through this agreement, parties to a mini-trial can do what they are nor-

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[5] A "successful" mini-trial is defined herein as one which results in settlement of a dispute.

mally unable to do in litigation, namely, fashion the entire proceeding according to their needs. Most of the mini-trials which were the subject of the ABA Survey were conducted pursuant to such written agreements.

Mini-trials, however, can be conducted without the benefit of a formal agreement. For example, in two of the successful mini-trials studied in the ABA Survey, agreement with respect to the rules and format of the mini-trial was embodied in an exchange of letters. In another successful Survey mini-trial, the general ground rules were set forth by the neutral advisor in a single letter. Notably, one participant suggested that although reaching some sort of agreement on rules prior to the mini-trial was probably necessary, it was more important to bring the parties together by initiating the mini-trial process than it was to worry about ground rules.

It should be noted, however, that attorneys who choose not to agree on specific rules and format in advance of the mini-trial or who agree to handle such matters in a less formal manner risk that there will be misunderstandings between the parties later which may ultimately impede the effectiveness of the process. Thus, in one of the Survey mini-trials in which there was no formal agreement on format, the mini-trial broke down during the information exchange/presentation stage. In another such ABA Survey mini-trial, which also failed to reach settlement, the neutral facilitator reported that the absence of an agreement on ground rules before the mini-trial was a key factor in the mini-trial's failure.[6]

It should also be noted that mini-trials are no longer exclusively voluntary arrangements. Some courts have begun to order parties to engage in a mini-trial before pursuing litigation.[7] Under court-ordered mini-trials, however, the parties usually do not have the luxury of drafting an agreement to suits their needs; in these cases, the court prescribes the rules and format for the mini-trial. As a result of this lack of flexibility, the court-ordered mini-trials may not always be totally satisfactory. Of the twenty-eight mini-trials studied by the ABA Survey, only two were either ordered or suggested by the court. Although both such cases settled, the attorney involved in the court-ordered mini-trial was displeased with both the court's imposition of rules and format and the outcome.[8]

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[6] In this mini-trial, which involved a $4 million construction claim and three different parties, the neutral, a former judge, reported that he discussed the subject of the mini-trial briefly with the parties in a conference call, and agreed to meet with the parties subsequently. The ground rules for the format of the mini-trial, however, were never discussed. When the parties met with the neutral for the first time, they showed up with their own witnesses and cheering sections. Each side proceeded to present their "evidence" in a harshly adversarial manner, which only widened the breach among the parties. After the mini-trial was over, the parties met separately in different rooms and asked the neutral to perform "shuttle diplomacy" to resolve the dispute. The neutral reported that the process failed and the case did not result in settlement.

[7] Courts in both Michigan and Massachusetts have adopted court-supervised mini-hearings or mini-trials in which the judge presides as the "neutral adviser." For a summary of one court-supervised mini-trial which was conducted in Massachusetts and for the rules of the Michigan federal court on mini-trials see Fine, Mini-Trial Workbook, supra at 56-9.

2. Binding or Non-Binding -- Although most mini-trials are nonbinding, parties can agree to be bound by the results of a mini-trial. In one successful mini-trial which was the subject of the ABA Survey, an employee grievance dispute, the parties entered into just such a binding mini-trial agreement.[9]

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[8] This mini-trial involved an asbestos dispute. In that case, a court in Philadelphia ordered an expedited mini-trial with a trial judge from the Court of Common Pleas as the "resolver." According to the attorney interviewed, this mini-trial, like most others ordered by Philadelphia courts, was run like a medical trial in which the only issue considered is the medical condition of the plaintiff and in which much of the evidence usually admitted at such a trial (i.e., evidence concerning employee conditions, product identification, notice of hazard, etc.) is omitted. The attorney's main complaint about the mini-trial in asbestos litigation was enforceability ("Parties just go through them as quickly as possible intending to appeal them afterward").

[9] In this mini-trial, an employee brought a Title VII claim against a large company. The attorney for the company decided to hold a mini-trial because he believed he had a strong case and because he thought a mini-trial would be cheaper. The parties agreed that a local law professor would be the "arbitrator" of the dispute with full authority to grant such
(footnote continued)

Additionally, in an effort to put more "teeth" into the mini-trial, some parties to a mini-trial have begun to include provisions in the agreement which impose monetary penalties on a party which declines to accept a settlement offer yet subsequently receives less than the offered amount at trial.[10] There was such an agreement in one of the court-ordered mini-trials which was a subject of the ABA Survey. In that mini-trial, the parties agreed that after the information exchange itself they would each provide the court with a dollar figure based on their best estimate of the outcome of a trial. The court was supposed to choose as between the two figures. The agreement provided that after the court made its choice the other side be given 30 days to accept or reject the figure, with the understanding that if the other party declined to accept the figure chosen by the court and received less at trial than it would have received had it accepted the settlement offer, then a liquidated damage provision would come into play.[11]

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relief as a federal court would grant. They agreed that the only grounds on which the decision could be challenged were grounds enumerated in the United States Arbitration Act. The arbitrator rendered a decision for the company.

[10] See Fine, Mini-Trial Workbook, supra at 5.

[11] This mini-trial involved a $30 million dispute between a retail jobber and a large company over alleged misrepresentations made by one of the company's employees over an extended (footnote continued)

3. Drafting -- For the sake of simplicity and convenience, parties who use mini-trials to resolve their disputes often base their agreements on sample mini-trial agreements prepared by the Center for Public Resources, and add or revise such samples in accordance with the needs of the case. Drafting such agreements in consultation with other organizations which sponsor alternate dispute resolution, such as Endispute or the Center for Public Resources, is also common. Of the twenty-eight mini-trials which were the subject of the ABA Survey, four were based on agreements drafted by either Endispute or the Center for Public Resources, while in three other mini-trials the attorneys indicated that they had consulted one of these two organizations about some aspect of the mini-trial process (e.g. the neutral adviser, the format or the setting).[12]

Although attorneys obviously can draft a mini-trial agreement without reference to a sample mini-trial agreement or consultation with an ADR organization, many participants

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period of time. The dispute was described as a "swearing contest" and became the subject of a mini-trial largely because the federal district judge before whom the litigation was pending suggested that a mini-trial be used to resolve the dispute. The matter was settled after negotiations at the figure proposed by the large company during the mini-trial process.

[12] Additionally, Endispute participated in the drafting of a mini-trial agreement for a Survey mini-trial which was never conducted.

in the ABA Survey generally believed that discussion with someone familiar with the mini-trial process may be advisable for attorneys who have never engaged in a mini-trial. Even where an attorney has already participated in a mini-trial, several of the attorneys surveyed believed that it may be wise to let an ADR organization prepare an initial draft of the agreement simply to eliminate the potential for bickering with the opposing attorney.

If an ADR organization does not handle the drafting of the mini-trial agreement, it is probably important that the drafting be supervised by attorneys, or at least by persons who are knowledgeable in negotiating contracts. For example, in one of the mini-trials covered by the ABA Survey which involved a patent dispute, business representatives from each side were put in charge of the drafting. That mini-trial never took place because the business persons were unable to agree on the terms of the format.

4. Individual Provisions -- Although the precise content of mini-trial agreements varies from case to case, the Survey revealed that the bulk of these agreements include provisions which set forth issues to be discussed at the mini-trial and the essential obligations of the parties to present their cases and attempt to negotiate a settlement.

Other types of provisions which the Survey disclosed are typically found in mini-trial provisions include:

a) Provisions regarding confidentiality -- Unlike litigation in the courts, disputes which are resolved through mini-trials can be kept confidential by inclusion of special confidentiality provisions in the mini-trial agreement. The provisions usually stipulate that the parties will not disclose the contents of the agreement or the information exchange conducted pursuant thereto except by consent of the parties or through court order. In many of the mini-trials studied by the ABA Survey, confidentiality provisions were included in the mini-trial agreements.

In addition to the mini-trial agreement between the parties, parties conducting a mini-trial which involves a neutral expert will usually ask the expert to sign a secrecy agreement in which he agrees to maintain the confidentiality of the proceedings (A sample secrecy agreement is contained in the Appendix.)[13]

b) Provisions regarding neutral expert -- If the parties choose to have a neutral expert, they may want to identify the name of the expert in the agreement or else include a provision in the agreement determining the manner in which the expert is to be chosen.[14] This prevents the selection problem from arising later, only a few days or weeks before the mini-trial itself is scheduled to begin.[15] Many mini-trial agreements also contain extensive provisions regarding the role which the neutral should play in the mini-trial as well as the extent to which the neutral may or may not communicate with each party prior to the mini-trial. Some agreements provide that the neutral act as a mediator between the two business representatives. Others provide that he give an oral assessment of the dispute immediately after the presentation and then leave the business persons alone to negotiate. Still other agreements require that the neutral provide a formal written opinion on the merits of the dispute.

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[13] It should be noted, however, that these provisions may not prevent disclosure to third parties of information obtained in the mini-trial. For a discussion of this disclosure problem see infra at 36-7.

In one of the Survey mini-trials which involved a patent dispute, the mini-trial agreement, which was drafted by Endispute, provided both for a method of selecting the

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14. One common method of providing for the expert's selection is to set a deadline in the agreement for choosing the neutral and then provide that if the deadline comes without the parties having chosen a neutral, an ADR organization, such as the CPR, will make the choice from a list of advisors.

15. To ensure the neutrality of the advisor the agreement may require that prior to retaining an advisor, the parties disclose all previous contacts which the parties have had with that proposed advisor.

neutral and the extent of the neutral advisor's participation in the mini-trial. With respect to the neutral's participation, the agreement provided that the advisor would tell the parties how he thought a court might decide.[16]

c) Provisions regarding discovery and exchange of briefs -- Mini-trial agreements often limit the amount of discovery to be had in the mini-trial by specifying that only certain kinds of documents be exchanged or by stipulating to the number of witnesses, if any, to be examined before the mini-trial. Mini-trial agreements may also fix a time limit for discovery (usually between 30 to 90 days). This process helps to narrow the issues in the controversy and gives the parties a "good look" at one another. Most of the mini-trials which were the subject of the ABA Survey provided for some discovery (usually an exchange of documents) prior to the mini-trial. In one mini-trial which was a subject of the ABA Survey, the parties agreed to two sets of depositions each and one set of requests for admissions, not to exceed twenty requests.[17] Attorneys who failed to provide for some discovery before the mini-trial stated that the absence of discovery was a disadvantage which led to unfortunate "surprises". On the other hand, one attorney cautioned against providing for too much discovery, arguing that discovery can usually be limited to production of a few key documents and the deposition of a few witnesses.

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[16] It should be noted that before giving his opinion in this mini-trial, the neutral advisor discussed both the contentions of the parties as well as what the parties had been able to demonstrate at the mini-trial.

[17] In another Survey mini-trial (involving a $500,000 contract claim), the parties agreed to limited discovery over a 90-day period including depositions, document production and interrogatories.

Parties may also want to provide for the exchange of briefs or position papers before the mini-trial. In at least four of the mini-trials which were the subject of the ABA Survey, the parties agreed to exchange such papers. Moreover, in one mini-trial in which position papers were not exchanged, the attorney interviewed indicated that he regretted not having followed this practice because such an exchange would have been very helpful.

d) Provisions regarding length of the information exchange -- Most formal mini-trial agreements contain provisions regarding the length of the information exchange. Typically, such provisions provide that two days be devoted to argument (one day for each side).[18], and a third day to negotiation.

e) Provisions regarding format of the mini-trial -- Many written mini-trial agreements set forth the proce-

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18. One Survey mini-trial involved an agreement to limit the mini-trial itself to seven hours.

dures to be used at the mini-trial itself, including the rules of evidence to be used, the manner in which presentations are to be made, the number of witnesses to be called and the manner in which questions are to be handled. Those surveyed generally agreed that the provisions regarding format should be flexible, so that both parties feel that they will have ample opportunities to present their case. For example, in three of the mini-trials which were the subject of the ABA Survey, the parties had agreed to a schedule and rules (regarding questions, for example), only to abandon both the schedule and the rules in the interests of cooperation when it came time to actually conduct the mini-trial.

f) Provisions regarding negotiation -- Based on the Survey, it appears that provisions regarding the negotiations can be extremely important and must be carefully drafted. Some mini-trial agreements provide that the negotiation take place with the neutral advisor present; others require that he not be involved unless the business representatives so request. The agreement may also provide that the lawyers for both sides be present. These provisions should not be underestimated. For example, one of the attorneys polled in the ABA Survey indicated that the absence of provisions regarding procedures to be followed upon completion of the mini-trial in which he was involved was a definite drawback which caused months of delay and forced the parties to meet frequently to discuss a final resolution of the dispute.[19]

g) Provisions regarding fees and costs -- Although the fees and costs of a mini-trial are not as great as those for a trial, they are not insubstantial.[20] Thus, a method for sharing such costs should be provided for in the agreement. The principal costs of the mini-trial are the fee and travel expenses for the neutral advisor (including his hotel expenses) and the expense of renting a room for the mini-trial itself. These costs are usually shared evenly by the parties. In two of the Survey mini-trials the costs for the advisor amounted to $7,500, while in another the cost was $5,000. In one of these three cases, the parties split the fee. In an employee grievance suit, however, the employer may want to agree to pay all fees and costs as an inducement to resolve the case via mini-trial. In one such mini-trial, which was a subject of the ABA Survey, the employer assumed all the costs of the mini-trial.

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[19] In this mini-trial, an insured company sued its insurer under a business interruption policy in connection with an industrial factory explosion. The insured's claim was for $40 million. The insurer offered to settle for $5 million. The mini-trial was proposed by the insurance company and took place about six months after the litigation began. When the mini-trial was over, the parties were still not ready to settle but were apparently also unwilling to litigate the matter. The mini-trial agreement, however, provided no guidelines or directives as to what to do next. Thus, shortly after the mini-trial, one of the parties suggested that there be further meetings at which more detailed evidence could be presented concerning some of the factual issues. Two or three such meetings took place over the next few months. At these meetings, the mini-trial process was continued, with technical presentations made by both sides, followed by a question-and-answer period. These meetings resolved most of the major issues. Then a final meeting was held at which the insured made another presentation. Following this, a negotiation session took place on the same day, and the matter was settled.

[20] At least two of the attorneys interviewed in the Survey noted that the costs of a mini-trial may, under certain circumstances, be quite high.

C. The Setting

Another important element of the mini-trial is the setting. Most parties surveyed used a non-judicial neutral setting for the proceeding. For example, one of the mini-trials which was the subject of the ABA Survey was held at the Second Circuit Federal Bar Counsel offices at the mid-point between the two parties' locations. Another mini-trial was held at the law offices of the neutral advisor, while yet a third was conducted in the dining room of a private club. Hotels or motels and conference centers are also common neutral settings. Where neutral settings cannot be found, however, a board room (usually of one of the parties) is often used. In one of the mini-trials which was the subject of the ABA Survey, the board room of one of the parties was used. In another subject mini-trial, the parties used the law library of one of the parties. In yet a third mini-trial, the office of counsel for one of the parties was the setting.[21]

The setting may be critical to the success of the mini-trial. Some of the participants in the Survey agreed that a large, formal setting may lead the participants to conduct themselves as they do in a court, thereby inhibiting the flow and style of the information exchange. By contrast, it was noted that a smaller business setting may lead the participants to view the mini-trial as a large negotiating forum and thereby contribute to a speedy resolution.

D. The Decision-Makers

1. Who They Should Be?

a) Use of a neutral expert -- As originally conceived, the mini-trial provided for the giving of presentations either to a neutral expert alone or else to a neutral expert and one authorized executive from each side. The expert, of course, was designed to be an analog of a judge, *i.e.*, one who could weigh the merits of the presentations submitted by the parties and provide an objective opinion.

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[21] One law firm regularly holds mini-trials on its premises, having set up a courtroom and jury-box solely for this purpose. This firm sometimes videotapes the mini-trial and presents the tapes to the business representatives later, thereby making it unnecessary for them to actually attend the proceedings. *See* "Fred Bartlit on Mini-Trials," *Alternatives* 1, (June 1985).

The ABA Survey demonstrated that mini-trials continue to use such experts. In the ABA Survey, sixteen of the mini-trials employed neutral advisors and most of the attorneys interviewed said that the advisors were helpful in resolving their disputes. Several of the attorneys interviewed indicated that the advisor was most helpful when he was the most actively involved in the process. Such active involvement often include asking questions of the presenters, giving an opinion on the merits of the case, either to all assembled at the mini-trial or to the negotiators only,[22] and engaging in the negotiations with the business representatives.[23]

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[22] One attorney interviewed for the Survey indicated that he thought the opinion or "forecast" should be given in private to the business respresentatives only.

[23] In one Survey mini-trial involving an alleged manufacturing defect in a series of trailers, the neutral "moderator" took an active role in the presentations, asking questions, pointing out the strengths and weaknesses of each side and focusing the discussion. The attorney interviewed about this mini-trial reported that this dispute was settled one day after negotiations and saved the parties $250-$300,000 in legal fees. He reported that both sides were pleased with the result.

In another Survey mini-trial, the parties agreed before hand not to allow the neutral to participate in the negotiations unless the business representatives felt comfortable with his involvement. Then, after the neutral had given his "forecast" of how he thought the case would be resolved at trial, both parties chose to involve him in the negotiations and the case was settled after only four hours of discussion.

In addition to volunteering an opinion on the merits of a dispute and helping the parties in negotiations, a neutral
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Although some of those surveyed believe that the neutral advisor should be a retired judge, preferably with experience in the subject matter, or some other person with a legal background (e.g., a law professor or trial lawyer), it was generally agreed that in principle the advisor need not have any knowledge of the law at all. Indeed, he can be anyone on whom the parties agree. In mini-trials involving highly technical issues or highly specialized areas, such as patents, the neutral advisor often is an expert in the field. In one patent case which was the subject of the ABA Survey, for example, the advisor was the former Commissioner of Trademarks. In another Survey mini-trial involving patent law, an experienced patent lawyer was the advisor. Similarly, engineers are often the advisors in mini-trials involving construction contracts. One attorney interviewed in connection with the ABA Survey noted that where large corporations were involved it was important to choose a neutral advisor of some stature and not merely a "local person."

Although the ABA Survey reflects that the majority of mini-trials still use neutral advisors, the Survey also reflects that such persons are not indispensable to the success of a mini-trial. In five of the mini-trials which were

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can also help to design the mini-trial's rules or resolve discovery disputes. See Fine, Mini-Trial Workbook, supra at 14-15.

the subject of the ABA Survey the parties did not use an advisor. Moreover, in a few of the mini-trials where an advisor was used, the attorneys interviewed expressed doubts about the ultimate need for their presence, particularly given the cost of retaining them.[24] Other attorneys favored the use of advisors but suggested that their role be limited and carefully circumscribed with respect to communication with clients. For example, one attorney advised against allowing the advisor to engage in discussion with the parties (usually after the presentations) unless the attorneys are also present.

b) Use of business representatives -- In virtually all mini-trials, business representatives for each side play a key role as decision makers. Indeed, the ABA Survey indicated that using business representatives as the exclusive decision makers is becoming more popular because it avoids the costs of hiring the neutral and disputes over his selection, and it encourages negotiation. According to a few of the attorneys interviewed for the ABA Survey, however, it is important that business representatives on the panel have little prior familiarity with the case. This is necessary to ensure that the business persons approach the issues in the case freshly and as objectively as possible. One attorney interviewed indicated that the mini-trial in which he participated was almost completely undermined by the fact that throughout the pre-mini-trial period the attorney on the other side had been feeding his business person with progress reports on the case.

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[24] For example, one attorney who participated in a Survey mini-trial involving complex issues indicated that the parties chose not to use a neutral partly because they believed it would have taken too long for the neutral to "get up to speed" on the issues.

The business person should probably be a true business person as opposed to a lawyer. This is important because a lawyer may be more inclined to be an advocate than a negotiator. One attorney involved in a mini-trial which was a subject of the Survey expressed resentment that the opposing side had chosen a lawyer as their "business person."[25] Finally, and perhaps most importantly, it is essential that the business persons have authority to bind the companies they represent. Absent such authority, the mini-trial may be a waste of time.

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[25] This mini-trial involved a dispute between a private company and a state government arising out of an oil spill. The state government appointed a senior lawyer from the Attorney General's office rather than a busines person as its negotiator. The attorney interviewed about this mini-trial represented the company. Ironically, according to the attorney for the company, the appointment of the lawyer from the Attorney General's office as a negotiator, though seemingly unfair at first, turned out well for the company since its appointee was a better negotiator than the attorney for the state government.

Although the role of business persons as decision-makers at mini-trials has been uniformly held to be positive, the attorneys interviewed did have a few reservations about the participation of business representatives in the process. For example, two attorneys stated that presentation exclusively to business representatives fosters unnecessary cost-splitting. These attorneys argued that when issues are presented to businessmen, the tendency is simply to settle for half the amount of damages requested by the plaintiff, rather than to deliberate carefully with respect to the merits of the case. On the other hand, none of these attorneys went so far as to say that this tendency merits recourse solely to the neutral as a decision-maker.

c) Size of the panel -- As it was originally conceived, the mini-trial decision-makers were supposed to be a panel of three. However, mini-trials can be presented before much larger panels. One of the mini-trials which was a subject of the ABA Survey was conducted before a panel of seven, including one business representative and two attorneys from each side and one neutral expert. Another mini-trial panel consisted of five persons, two business representatives from each side plus one neutral. Still another panel had four individuals, two business representatives from one side, one from the other, plus the neutral.[26]

Similarly, mini-trials can also be conducted before a panel smaller than three. Several years ago, one employee grievance mini-trial was put on before one person.[27] Additionally, as noted above, the Survey disclosed that there is a trend toward making the requisite presentations before a panel of two, which includes one business person from each side. Generally, most of the attorneys who were interviewed for the ABA Survey and participated in mini-trials with large panels expressed a preference for a smaller panel.

E. The Presentations

1. In-House Counsel, Retained Counsel, or Businessmen -- Mini-trials can be organized and presented by inside counsel, retained counsel or non-legal representatives of each party. Thus far, in most reported mini-trials the attorneys have been responsible for both the organization and

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[26] Another survey mini-trial also was conducted before a panel of four. However, this panel included two neutrals (including one retired judge) and two business representatives.

[27] Although this form would seem to be unattractive to the plaintiff-employee, it was successful in the above mini-trial primarily because the employee was allowed to pick the executive to serve as the decision maker and chose someone whom he trusted.

presentation of the proceedings. Of the mini-trials subject to the ABA Survey, for example, all but two were conducted exclusively by attorneys on both sides.[28] However, if the issues are simple, from a legal standpoint, and a claim has yet to be filed, it may be possible to have the attorneys work on the drafting of the mini-trial agreement and let the businessmen do the presentations. One attorney interviewed in the ABA Survey indicated that he thought non-lawyers could handle mini-trials. Additionally, even where the attorneys are in charge of the mini-trial, the mini-trial can be structured so that the decision-makers ask the questions and the "presenters" give the answers (see infra at 31).

In an effort to save costs, more and more mini-trials are now being handled by inside attorneys. The ABA Survey reflects that fourteen of the subject mini-trials were run by inside counsel for the corporation. Some attorneys feel that using retained counsel is preferable since the inside lawyer may be too close to the dispute.

Most attorneys agree that whether the "presenters" are inside or outside attorneys, it is particularly important to make one's presentations simple and with flare. This is because the presentations usually have to be short and are aimed not at judges but at executives who are accustomed to hearing advertising-type presentations from subordinates. One attorney interviewed for the ABA Survey likened the presentations to "closing arguments." Not surprisingly, at least three attorneys polled in the mini-trial survey indicated that attorneys with extensive trial experience are particularly well suited to the mini-trial. On the other hand, as one attorney observed, any trial lawyer involved in a mini-trial must remember to be flexible and have a mind set toward settlement as opposed to all-out litigation. Lack of such flexibility will invariably inhibit discovery and frustrate the mini-trial process. Trial lawyers must also remember that the tactics required in a mini-trial differ from those which are needed in a normal trial. As one attorney noted, for example, in a mini-trial, it is inappropriate to "go for the jugular." Indeed, counsel must appear reasonable and be more "delicate" than usual.[29]

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[28] In one of these two Survey mini-trials, an attorney and an expert did the presentations for one side, while two "technical" persons did the presentations for the other side. In the other mini-trial, which involved a patent dispute, one of the presenters for one side was a technical person who presented arguments as to one issue only.

2. Length -- The Survey and a review of related mini-trial materials indicates that mini-trials typically

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[29] In one of the mini-trials that failed to result in a settlement, the judge interviewed for the Survey indicated that the markedly adversarial nature in which the attorneys conducted their examination of the witnesses exacerbated the dispute between the parties.

last from one to three days though there are few which have gone on for a week or more. There appears to be no correct length. Disputes which are particularly complex may require additional time. To allow time for the information to be digested a few mini-trials have even used intervals of two to three weeks between sessions (*i.e.*, two days of mini-trial presentations, two weeks of preparation, then a resumption of the mini-trial for two days for examinations, summations, etc.).

In general, however, the ABA Survey reflected a preference for speed. All but a handful of the mini-trials which were the subject of the survey lasted one day. Attorneys involved in mini-trials which lasted longer than a day, said that they would have preferred a shorter mini-trial. On the other hand, one attorney involved in a patent case said that the brevity of the presentation period was a disadvantage because it allowed the patent infringer to argue all his defenses, without giving the patentee sufficient time to rebut the defenses.[30]

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30. In this case, the plaintiff was a patentee suing to prevent infringement of its patent. Although the attorney for the patentee sought to set up a three-day mini-trial, the other side insisted that each side have only one day to make its presentations. According to the patentee's attorney this resulted in the defendant's "throwing all of its rocks" on the second day, thereby leaving the patentee with too little time for rebuttal. The patentee's attorney, however, indi-
(footnote continued)

3. Format -- The key common elements of the format of the mini-trial are (1) presentations by both sides to a panel of decision-makers followed by (2) discussion or negotiation among the panelists. The ABA Survey revealed, however, that beyond these two basic structural elements, the format of a mini-trial can be subject to substantial variation from one mini-trial to another. The Survey reflected, for example, that successful mini-trials can be conducted both with and without witnesses, documents or questioning by either the presenters or the decision-makers. Similarly, successful mini-trial presentations may be made in a particular sequence or in free-for-all fashion.

(i) use of witnesses -- The use of witnesses during the "presentations" appears to be inconsistent with the spirit of the mini-trial, with its emphasis on negotiation and the avoidance of judicial trappings. The former judge who served as the facilitator for four mini-trials which were the subject of the mini-trial Survey stated that having witnesses at a mini-trial "defeats the purpose" of the mini-trial. Nevertheless, at least eight of the successful mini-trials in the Survey involved the use of witnesses.[31]

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cated that the matter was ultimately resolved to the satisfaction of his client.

[31] One attorney interviewed in the Survey stated that wit-
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In one Survey mini-trial involving an employee grievance suit, there were a total of nine witnesses. In another Survey mini-trial, each side presented five witnesses, including three employee witnesses, one expert witness plus outside counsel. In almost all of these mini-trials, however, the rules of evidence used were either quite liberal or nonexistent. Indeed, there was no cross-examination at all in two of these eight mini-trials. Moreover, in another of these eight mini-trials the witnesses functioned more as presenters of facts and arguments than as true witnesses.[32]

(ii) use of documents -- The use of documents in the presentation phase of the mini-trial is also common. In five of the mini-trials studied in the Survey, the parties used documents to illustrate various contentions or facts. In two such cases, the attorney used binders or notebooks to organize the documents. One attorney said that he used ten key documents in the mini-trial, weaving these documents into

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nesses were used at his mini-trial merely to "clarify the issues." Another attorney interviewed in the Survey stated that he called on three witnesses in his mini-trial merely to supplement his narrative presentation.

[32] Some attorneys have suggested the possibility of using court reporters at mini-trials so that the parties might have transcripts of the proceedings. Although such a practice might have its advantages in certain circumstances, most attorneys do not favor the idea because they believe that on the whole it would undermine the informal atmosphere of the mini-trial and create a record that might be discoverable.

his narrative presentation to the decision-makers. Three of the survey mini-trials involved the use of videotapes, charts or slides.

(iii) question and answer -- Use of a special question and answer period following the presentations is also common to mini-trials. Eight of the Survey mini-trials made use of such a period.[33] In two of these mini-trials the question and answer period was a free-for-all, in which anyone could ask questions of anyone else. One attorney indicated that this free-form approach was very helpful in clarifying matters for the decision-makers because the issues in the case were so technical. In two others, the decision-makers were the principal questioners and the attorney-presenters were the ones giving the answers.[34] Although the decision-makers in one of these two mini-trials were allowed to ask questions, they were prohibited from impeding the mini-trial process by asking "argumentative" questions.

(iv) arguments -- Virtually all of the Survey mini-trials involved 45-minute to three-hour statements of position or arguments (or summaries of same) by each side.

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33. In one Survey mini-trial there were two such periods, one after the initial presentations, another after the rebuttal presentations.

34. In one of these mini-trials the lawyers were precluded from asking any questions.

Six of these mini-trials provided for rebuttal time by the other party, with the time for such rebuttal ranging from one-half hour to one and one half hours for each side.

F. The Negotiations

Like the format for the presentation phase of the mini-trial process, the structure of the negotiations is usually subject to substantial variation from one mini-trial to another. In the vast majority of the Survey mini-trials, the negotiations were conducted immediately following the presentations and included only the business representatives. In a few of the Survey mini-trials, however, the attorneys also participated in the negotiations.[35] Similarly, in a few of the Survey mini-trials the neutral engaged actively in the negotiations. In one of the unsuccessful mini-trials, the parties caucused in three separate rooms and negotiated with each other through the neutral.

As for length, many of the Survey mini-trials involved negotiating sessions which lasted from three or four hours to a full day. However, a few of the mini-trials involved several negotiating sessions over a period of time.

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[35] In one Survey mini-trial, the neutral ended up negotiating with the attorneys rather than the business representatives, despite the presence of the latter throughout the negotiations.

As with other elements of the mini-trial, there is no fixed way of organizing the negotiations. However, to the extent that the attorneys interviewed had comments in this regard, many agreed that it is probably wise to minimize the role of the lawyers in the process.

II. Problems Associated with the Mini-Trial

Like any device for resolving disputes, the mini-trial has some inherent problems which may make it unappealing to certain parties. Two problems in mini-trials which are alluded to frequently by attorneys who have participated in mini-trials involve initiating the proposal and preserving the confidentiality of the process against third parties. These areas are discussed at length below.

A. Initiating the Proposal

The first stumbling block in setting up a mini-trial is persuading both the other side and one's client to participate in it. This can often be difficult, particularly if neither side has had any experience with mini-trials or if one or the other believes that it has either a clear advantage or disadvantage in the case. Most of the attorneys polled in the ABA Survey whose adversaries had never participated in a mini-trial indicated that they met with resistance from the other side when they suggested a mini-trial. For the same reason, a few of these attorneys indicated that they had met with resistance from their own client when they suggested a mini-trial. It is therefore important to make the proposal as attractive as possible to all the parties.

1. Timing -- Timing the proposal so that it does not appear to reflect weakness or strength to the other side is critical. Mini-trials are sometimes proposed after both sides have gone through extensive -- and expensive -- discovery and the results have been inconclusive. By this time, each side has become familiar enough with each other to recognize that the proposal is a genuine attempt to resolve the dispute and not merely an attempt to gain an advantage over one's adversary. Of the twenty-eight mini-trials which were the subject of the ABA Survey ten were undertaken well after discovery had commenced.

Most of the attorneys interviewed in the ABA Survey favored initiating the proposal as early as possible, even before the filing of the lawsuit. One of the ABA Survey mini-trials was initiated prior to the filing of a lawsuit and settled successfully. In the eyes of most attorneys interviewed, the only problem with mini-trials which are proposed early is the lack of discovery. A few of the attorneys questioned about their participation in mini-trials conducted either before or shortly after commencement of a lawsuit indicated that the absence of sufficient discovery beforehand was a major drawback in conducting the mini-trials. For example, one attorney stated that as a result of not having had sufficient discovery, his adversary had a much greater command of the facts and as a result, dominated the mini-trial.[36] This problem can be ameliorated for by providing for discovery in the mini-trial agreement as part of the preparation for the mini-trial. At least five of the mini-trials which were subject to the ABA Survey provided for pre-mini-trial discovery.

2. Selecting the Initiator -- Determining who should make the proposal is often a critical decision. Where both sides are represented by retained counsel and the litigation has been acrimonious, it may be preferable for inside counsel to make the proposal to his counterpart on the other side. Where the parties have an ongoing commercial relationship the proposal can also be made by a business representative in a discussion with his counterpart from the other side. Finally, a party may want to consider having a third

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[36] Another attorney expressed regret that because of the inadequacy of discovery prior to his mini-trial, there was insufficient opportunity to determine whether there were any "smoking guns" in the documents of the other side.

party with no connection to the dispute whatsoever make the proposal.

B. Keeping Mini-Trial Statements Confidential

Another major problem is the discoverability of mini-trial statements. Although there is substantial case law protecting settlement discussions from discovery, which should be applicable to the mini-trial context, under Rule 408 there is little to prevent third parties from compelling disclosure of mini-trial statements or even the opinions of neutral experts. In one case, for example, Grumman Aerospace Corp. v. Titanium Metals Corp., 91 F.R.D. 84 (E.D.N.Y. 1981) the court granted a motion to enforce a subpoena for a special fact-finding report prepared by a neutral advisor in connection with a settlement in an unrelated dispute. Production of the report was ordered even though the report was subject to a confidentiality agreement which limited use of the report in litigation. In its decision, the court held that private parties could not be allowed "to contract privately for the confidentiality of documents, and foreclose others from obtaining in the course of litigation, materials that are relevant to their efforts to vindicate a legal position." The court noted that "[t]o hold otherwise would clearly not serve the truth-seeking function of discovery in federal litigation."

In light of this decision, parties to a mini-trial should take great care in protecting the confidentiality of the neutral's role in a mini-trial. Apart from requiring the neutral to sign a secrecy agreement, the parties may consider having the neutral give an oral opinion, or no opinion at all.[37]

III. Types of Disputes Suitable for Mini-Trial

Although, theoretically, any dispute might be suitable for resolution by way of a mini-trial, historically certain kinds of cases have been considered particularly suitable for mini-trial treatment. Conversely, other kinds of cases have been thought to be inherently unsuitable to the mini-trial form. This section of the report discusses these case-suitability issues particularly as reflected in the ABA Survey.

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[37] For an extensive discussion of this problem see Restivo and Mangus, "Alternative Dispute Resolution: Confidential Problem-Solving or Every Man's Evidence," in Fine, Mini-trial Workbook, supra at 61-76.

A. General

Participants in and students of the mini-trial as a device for resolving disputes typically believe that a case is suitable for a mini-trial only if the parties really wish to settle their differences. The ABA Survey confirmed this view inasmuch as most of the attorneys interviewed agreed that a commitment to settle on the part of the parties was critical to the success of the mini-trial. Parties in a "swearing contest" will neither be interested in nor aided by a mini-trial.

B. Mixed Law and Fact

Commentators on the mini-trial have always claimed that the type of lawsuit best suited to a mini-trial is one with mixed questions of law and fact. Theoretically, this is because such cases are not "clear winners." By contrast, cases involving purely legal questions are thought not to be suitable since presumptively they can more readily be resolved by way of summary judgment.[38] Similarly, it has been believed that cases which involve numerous fact issues, because they often require extensive discovery, also do not

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38. In the Survey mini-trial involving asbestos (a court-ordered mini-trial), the attorney interviewed claimed that his case could and should have been resolved by way of summary judgment.

lend themselves to an abbreviated form of dispute resolution such as the mini-trial.

The ABA Survey, however, reflects that the mixed fact-and-law case is not the only one suited to the mini-trial. One attorney interviewed for the ABA Survey, for example, indicated that a dispute involving purely legal issues and no fact issues could also be resolved by way of a mini-trial. Moreover, several of the successful mini-trials subject to the ABA Survey involved disputes in which complex and technical fact issues predominated.

C. Cases Involving Long Term Business Relationships

Cases between corporate entities who have an ongoing commercial relationship have also been viewed as good candidates for mini-trials. This is because the bad feelings which often arise in the context of long drawn-out litigations can usually be avoided in the mini-trial because of its brevity and more informal structure.

The ABA Survey confirmed that this type of case is among the most suitable for resolution by way of a mini-trial. In at least three of the mini-trials which were the subject of the ABA Survey, the parties enjoyed an ongoing commercial relationship with each other and all of these mini-trials resulted in a settlement.

D. Cases Involving Large Monetary Amounts

Although a mini-trial can be used no matter what the amount in controversy is, from the point of view of the parties, the mini-trial has always been thought to be more attractive in cases involving larger dollar amounts. This is because the savings to the parties are by comparison more significant in big cases. As discussed earlier, nine of the subject mini-trials involved claims ranging from $1.9 to 40 million dollars while three others involved $500,000 claims. Whether or not the mini-trial is suitable for disputes involving substantially smaller amounts, however, has yet to be shown, since almost all mini-trials have involved sums in excess of $100,000 and familiarity with the mini-trial format still remains largely the monopoly of a relatively small number of attorneys and corporate clients.

E. Transnational Disputes

Because disputants are often reluctant to litigate in a foreign adversary's court system, mini-trials have become attractive to parties involved in transnational disputes. As compared with another form of alternate dispute resolution, i.e., arbitration, the mini-trial has substantial advantages in that 1) it gives the parties much greater freedom in setting up the format and rules for the proceeding and 2) is usually non-binding and, therefore, involves much less risk. Although only one of the mini-trials which was subject to the ABA Survey involved a transnational dispute, this mini-trial did prove to be a success. A recent compilation of summaries of successful mini-trials confirmed that at least one other successful mini-trial in the United States has involved a transnational dispute.[39]

F. Cases Where Only Damages Are At Issue

Cases in which the parties agree on liability but differ on the question of damages appear to be ideal for the mini-trial. These cases often involve parties who truly want to settle their differences but simply do not know how. They may also involve cases in which the parties are afraid that they will lose face, either by paying more or accepting less than they think they should. The mini-trial is a perfect solution for these cases because it allows for an up-front discussion of the damage issue with feedback from an advisor whose recommendations need not be binding. One of the mini-trials which was a subject of the ABA Survey resolved just such a dispute.

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[39] See Fine, Mini-Trial Workbook, supra at 52 (U.S. German mini-trial summarized).

G. Particular Legal Areas Suitable to Resolutions via Mini-Trial

1. Patent infringement -- Commentators have always held that a lawsuit involving patents is quite suitable to the mini-trial because such a lawsuit is potentially long, expensive, and highly technical.[40] The results of the ABA Survey, however, do not appear to support this widely held view. One attorney polled in the ABA Survey was involved in two mini-trials relating to patents, neither of which ended well (one broke down during the presentation stage, while the other collapsed during negotiations on format). Another attorney stated that he thought that patent cases were completely unsuitable for resolution by way of mini-trial because such disputes involve "black or white" type answers ("Either the patent is valid or it isn't").

2. Products Liability -- For the same reasons that have been held to apply to patent suits, products liability suits have also been thought to lend themselves to resolution through mini-trials, particularly if they are between the

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[40] For an extensive discussion of why such disputes are thought to be particularly suitable see Borovoy, Roger and Janicke, "The Mini-Trial Approach to Resolving Patent Disputes", 62 J. Pat. Off. Soc'y 337 (June 1980).

manufacturer and a distributor or retailer. The ABA Survey confirms this inasmuch as five of the twenty-eight subject mini-trials involved products liability issues and all of them settled to the satisfaction of the parties. However, as noted above, product liability suits in which the plaintiffs are victims of personal injury are generally believed by those surveyed not to be suitable for mini-trials.

3. Contract -- Contract cases involving government contracts, or construction and supply contracts are also quite suitable for mini-trial treatment because they often involve a blending of law and fact. Fifteen of the mini-trials subject to the ABA Survey were contract cases and all of them were settled favorably through the mini-trial process. Five of the cases involved construction contracts.

IV. Types of Disputes Not Suitable For Resolution via Mini-Trial

1. Individual Versus the Corporation

Most mini-trials have been employed in situations where both parties are corporate entities. It has generally been thought that cases in which an individual is pitted against a corporation, *e.g.*, personal injury cases, are not suitable for mini-trials simply because such cases are usually too emotionally charged.[41] The attorneys polled in the ABA Survey agreed that lawsuits involving individuals do not lend themselves to resolution via mini-trial. At least four of the attorneys interviewed, for example, stated that cases involving individual plaintiffs are not suitable for mini-trials. One of the reasons for this is that individual plaintiffs cannot recover punitive damages in mini-trials and are therefore unlikely to be attracted to this alternative to litigation.

2. Other Types of Cases Not Suitable For Mini-Trials.

In addition to cases pitting individuals against corporations, there are other cases which some attorneys interviewed in the ABA Survey indicated may not be suitable for mini-trial treatment. One attorney, for example, noted that actions in equity are not amenable to mini-trials because they are more difficult to compromise than actions at law. This same attorney also noted that cases where a state or local government is a party may not be appropriate for a mini-trial because such parties often cannot be as flexible in resolving a dispute as private parties can be. According to at least two other attorneys interviewed, cases involving witness credibility are generally less suitable for a mini-trial.

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[41] One attorney interviewed in the Survey indicated that such mini-trials also are not suitable because they are often controlled by plaintiffs' attorneys hired on a contingency basis, and by claims adjusters, neither of whom has an interest in settlement.

Additionally, the Survey revealed that for logistical reasons mini-trials involving numerous parties may be more problematic in setting up than those which concern two parties only. In one of the Survey mini-trials which involved more than two parties, for example, no settlement was reached partly because of communications problems in laying out ground rules. Another Survey mini-trial involving more than two parties never took place because it was simply too difficult ultimately to persuade all of the parties (there were four of them) to engage in the mini-trial.

V. Conclusions and Recommendations

A. Conclusions: Summarizing the Results of the Survey

On the whole, the results of the ABA Survey showed that mini-trials continue to be highly effective alternate tools of dispute resolution for various kinds of cases. Indeed, all but four of the mini-trials which were the subject of the survey ended in a final settlement,[42] and sixteen of the nineteen attorneys interviewed indicated that they were pleased with the outcome and were enthusiastic about engaging in a mini-trial again.[43] Several attorneys indicated that even if the mini-trials in which they were involved had not led to settlement, they would still have considered them to be beneficial because they forced the parties to come to grips with the issues sooner than they ordinarily would have. One of the attorneys interviewed indicated that the mini-trial also gives each side a good look at the trial skills of the other, thereby providing the parties with valuable information about trial strategy which can be used later, in the event that the mini-trial fails to bring about a settlement.

The results of the ABA Survey also confirmed that speed, cost-efficiency, and flexibility, in that order, continue to account for the current popularity of the mini-trial. All the attorneys interviewed in the survey indicated that the mini-trial process was an expeditious means of resolving disputes. Indeed, none of the mini-trials which were the subject of the ABA Survey lasted more than three days, and over half of them lasted only one day or less. Moreover, the preparation period for most of these mini-trials (a period usually devoted to depositions or an exchange of documents) never exceeded 90 days.

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[42] Three of these four mini-trials never reached the presentation stage. The fourth mini-trial went through both the presentation and negotiation stages but never settled.

[43] One of the three attorneys who did not express his unqualified endorsement of the process indicated that he thought the mini-trial was only a "limited success." The other two attorneys were both displeased with the outcome and "pessimistic" about their use of the mini-trial device again.

The attorneys interviewed in the ABA Survey also stated that mini-trials had led to substantial cost savings. One of these attorneys noted that the mini-trial saves costs not only because it shortens the dispute resolution period but also because it can be organized and run by inside attorneys and can make use of inside experts. Although the magnitude of these cost savings is always difficult to measure, some attorneys interviewed indicated that their savings amounted to as much as $300,000-400,000. Other attorneys interviewed stated that the costs of their mini-trials were 10% to 15% of what a trial for the same case would have been. Additionally, the comments of most of the attorneys interviewed reflected that the flexibility of the mini-trial, particularly the ability to adjust the format of the mini-trial, was one of its most attractive features.

As demonstrated above, four of the Survey mini-trials (both actual and proposed) did not achieve their objectives. Although no common factor can account for the unsatisfactory results in those mini-trials, one or more of the following appears to have contributed to such results: inability to coordinate multiple parties; lack of communication regarding ground rules; a tendency to treat the mini-trial as a regular trial; and a reluctance to settle the dispute. Most of these problems (i.e. lack of communication regarding ground rules, adversarial treatment of the mini-trial, inability to coordinate multiple parties) probably could have been averted had the parties known more about the mini-trial process.

B. Recommendations.

1. General

Based on the results of the Survey, both inside and outside attorneys should be encouraged to consider the mini-trial as a means of resolving a variety of different types of disputes. Although parties should be encouraged to use the mini-trial to resolve disputes involving very large sums of money, they should not be discouraged from using the mini-trial in cases which involve lesser sums, so long as the parties are seriously committed to settlement. Similarly, although parties should be encouraged to consider construction contract and product liability claims as particularly well-suited to the mini-trial, they should not hesitate to view the mini-trial as a means of resolving other types of disputes.

In deciding how to set up the mini-trial, (i.e. the agreement, the presentations, the negotiations, etc.), attorneys should be encouraged to be as flexible as possible, but should be advised against entering a mini-trial without first agreeing on a few basic rules. To the extent possible, the parties should attempt to avoid replicating the judicial process at the mini-trial (e.g., examinations of witnesses should be dispensed with, or, at the very least, conducted very informally). If the parties enter into a detailed written mini-trial agreement regarding the deadlines and format of the mini-trial, they should have an understanding which allows for occasional departures from the agreement.

Attorneys should be encouraged to use business representatives as their primary decision-makers and neutrals as facilitators, particularly where the issues are highly technical and the business representatives will likely want advice from an expert. The parties should also be advised, however, that they can dispense with the neutral -- and save substantial costs in the process -- in most other cases, including cases where the legal or factual issues are straightforward and the business representatives have a working relationship.

In order to encourage resort to the mini-trial the parties should be encouraged to include provisions in the contracts they draft which provide for mandatory recourse to a mini-trial prior to the institution of a lawsuit. Inside attorneys should consider adopting a policy which commits their companies to exploring mini-trial possibilities with any other company which follows the same policy. Over 200 companies have adopted a policy which commits them to exploring some form of alternative dispute resolution, including possibly a mini-trial, and have signed policy statements to that effect.

2. Evaluating a case for Mini-Trial Suitability

a) Who should do it? -- In order to increase the use of mini-trials, a special mechanism should be devised for examining the suitability of a case for ADR both at law firms and in large corporations. If the dispute has not reached litigation, the review should be done in-house by an attorney or committee of attorneys in conjunction with the key businessmen overseeing the commercial relationship with the other party. If possible, the inside attorney should, where possible, be someone with prior experience in mini-trials.[44]

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[44] One of the inside attorneys interviewed for the ABA Survey indicated that as a result of the success of a mini-trial in which he was involved, his company instituted a policy whereby all cases involving damages in excess of (footnote continued)

If a claim has already been filed in court, and the matter is in the hands of retained counsel, the retained attorney(s) should perform the same kind of review before pursuing the litigation.[45] If after such a review it is decided that the case may be suitable for a mini-trial but not until a later time, some mechanism for subsequent review should be developed. Another method of evaluation, whether the case is in the hands of inside or outside counsel, is to consult an organization which sponsors alternate dispute resolution, such as Endispute or the Center for Public Resources.

b) What should the review entail? Any review for mini-trial suitability should consider the following:

(i) The extent to which the case lends itself to summary judgment;

$50,000 are now reviewed for suitability for resolution by mini-trial.

[45] One large law firm in Chicago has established a Negotiation-Dispute Resolution Department which explores mini-trial and other options with the firm's litigators. Another law firm has set up a firm-wide policy of discussing the possible use of mini-trials with its clients. This firm has also assigned someone to be an ADR specialist to monitor new developments in the field and make recommendations regarding neutral advisors. See Fine, Mini-Trial Workbook, supra at 11-12.

(ii) The importance of maintaining a commercial relationship with the other party (if such a relationship exists);

(iii) The extent of the costs to be saved by use of the mini-trial;

(iv) The potential harm which might arise if information disclosed at the mini-trial is later obtained by third parties;

(v) The probability (if it can be determined) of reaching agreement with the other party as to the form, the neutral expert or other aspects of the mini-trial process.

2. BACKGROUND ON DISPUTE RESOLUTION MECHANISMS

C. Arbitration

POINTS ON A CONTINUUM: DISPUTE RESOLUTION PROCEDURES AND THE ADMINISTRATIVE PROCESS

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June 5, 1986*

This report was prepared for the Administrative Conference of the United States. The views expressed are the author's alone and do not necessarily reflect those of the Conference, its Committees, or staff. Portions of the report were revised prior to publication to reflect subsequent developments in the case law.

III
ADMINISTRATIVE ARBITRATION

Arbitration is a powerful, widely used dispute resolution technique. For example, the American Arbitration Association has over 60,000 arbitrators on its rosters[44] and more than 45,000 matters are referred to it annually for resolution.[45] Its use has been endorsed and supported by the U.S. Arbitration Act[46] which directs courts to enforce arbitration agreements and their resulting awards. The Uniform Arbitration Act, which forms the basis for legislation in more than half the states, establishes a similar provision for state law. Court annexed arbitration is growing in popularity and currently at least 16 states employ some sort of arbitration program as an adjunct to the courts.[47]

Because arbitration results in a decision that is imposed on the parties, its use is particularly appropriate for resolving "distributional" disputes in which a better bargain for one party means less for the other.[48] Reaching an agreement through direct negotiation is particularly difficult in those situations. Arbitration frequently serves as a stimulus to settle, however, since parties are forced to prepare their cases for presentation to the arbitrator, and they will also have to discount the potential of an adverse decision. Hence, like preparing for trial, the

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42. Goldberg, Green, and Sander, supra note 9, at 19.

43. Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4 (1983).

44. Telephone interview with Irene Conway, American Arbitration Association.

45. Telephone interview with Earl Baderschneider, American Arbitration Association.

46. 9 U.S.C. § 1 et seq.

47. Dispute Resolution Forum (Aug. 1985) at 2.

48. Schelling, The Strategy of Conflict, (1960) at 21.

potential of an arbitral award will itself change the parties' BATNA. Similarly, the parties can agree to submit their dispute to arbitration but not be bound by the arbitrator's decision. In that case, the award will serve as the basis for further negotiation.

Voluntary versus Mandatory.

There are essentially three types of arbitration and, since the relationship between the parties and the process itself may vary one from another, it is important to keep the distinctions in mind.

The first two types are voluntary, in which the parties agree to submit the dispute to arbitration. In the first, the agreement is made **before** any dispute arises. The agreement will typically be made in a contract which provides that any dispute arising under it will be submitted to arbitration. The provisions of the arbitration may then be set out. The second form is where the parties agree to submit a dispute that has arisen to arbitration instead of using some other process, such as litigation, for resolving it.[49] Although the two are different for some purposes, for the most part they are similar in their effect on the nature of the arbitration process. One major difference, however, is that a party that entered into a pre-dispute agreement to arbitration may change its mind once the dispute arises and seek to use some other process once confronted with the actual prospect of an arbitration.[50] Under such a situation, the parties may not be fully cooperative with each other in designing a system, and the coercion of the courts in enforcing an agreement to arbitrate may be needed.

The third type is where the process is imposed on the parties: it is the only forum available for resolving the matter, at least in the first instance. Mandatory court annexed arbitration is such an example. In these cases, the parties are generally not as free, if indeed at all, to define the process that will be used.

Nature of Arbitration.

Arbitration has no set, definite process, and indeed that is one of its main attractions. It is an inherently flexible procedure. Common threads run through most arbitration programs in the private sector, however:

Private Neutral. A private individual serves as the arbitrator. That is, the arbitrator generally does not serve in any official, governmental role, although

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49. There is a perception among some who are familiar with corporate dispute resolution that the vast majority of arbitrations are pursuant to pre-dispute agreements. Parties appear to be much more reluctant to submit an existing dispute to arbitration, but rather tend to favor litigation instead. Testimony of Michael F. Hollering, General Counsel of American Arbitration, at ACUS Hearings on Agency Use of Alternative Dispute Resolution by Administrative Agencies, May 2, 1986. Conversation with Jonathan Marks, President, EnDispute, Inc.

50. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 105 S.Ct. 3346 (1985); Hergel and Salpeter, Alternative Dispute Resolution May Have Limits, Legal Times (Dec. 23/30 1985) at 9.

there is nothing to prevent the arbitrator from being a government official absent any conflict of interest.

Parties Choose Arbitrator. The parties are usually able to select the arbitrator. This enables them to choose someone in whom they have confidence. In some instances it is important that they can select someone who has technical expertise in the subject matter of the dispute. That enables the parties to get right to the merits of the dispute, as opposed to having to educate a generalist judge with sufficient background so the matter can be put in perspective. It also enables the arbitrator to exercise a professional judgment based on experience and technical insight instead of solely on a "record" generated by the parties.

The parties themselves may identify an appropriate person or may select from a list tendered to them by an organization such as the American Arbitration Association. That choice may result from the parties' ranking those on the list and the person with the highest rank being selected, or each party may be permitted to strike a name, so that anyone not stricken could serve. If the parties are not permitted to choose, as is customary in the court annexed arbitration programs, a panel of three arbitrators often serves and a decision is made by majority vote. The arbitration in such programs is customarily nonbinding.

Parties Can Select the Norm. The parties can decide what standard the arbitrator will apply. It may be the law of a particular jurisdiction, the rules of some organization, or the ethos of the milieu in which the dispute arose. The norm may also be, and frequently is, the arbitrator's "own brand of justice."[51] If the arbitration program is imposed on the parties, the arbitrator will customarily apply the prevailing law or other established norm of the organization imposing the requirement.

Flexible Procedure. Since arbitration is a private dispute resolution process, the parties themselves can design its procedures. They can range from a virtually total emulation of a court process to the most informal and ad hoc. In some instances, full discovery is permitted and enforced on pain of default. In other cases major documents or other evidence on which a party will rely, are exchanged prior to hearing and in others nothing happens before the hearing. Organizations such as the AAA and the National Academy of Conciliators publish rules that are designed to govern the arbitration proceedings in particular substantive areas;[52] they can serve as the "default" rules that will apply unless modified by agreement of the parties. Because it is not a public process, the proceedings and the result can be kept private and confidential.

The common denominator in the process is that, unless they settle,[53] the parties submit evidence and argument to the arbitrator who makes the decision. As a result of the flexible procedure and the fact that the parties can select the arbitrator, the process can be conducted quite expeditiously should they wish, in terms of the time from when the dispute arises to the hearing, the length of the hearing itself, and the time from the close of the hearing to the decision. The parties can determine the trade off between the formality they desire and the need for expedition.

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[51] Jones, His Own Brand of Industrial Justice: The Stalking Horse of Judicial Review of Labor Arbitration, 30 UCLA L. Rev. 881 (1983).

[52] See, PBGC, FIFRA in App. II.

[53] It appears from preliminary research that many fewer cases that are submitted to arbitration settle as compared to those that go to trial. Whereas many do settle on the eve of the hearing, perhaps only half as many do so as are settled prior to a trial. This is perhaps surprising, and certainly something that needs to be borne in mind when considering institutionalizing arbitration on a broad scale.

While certainly one of the hallmarks and putative benefits of arbitration is its reduced transactions cost in terms of time and resources, that is not always the case. In some instances the arbitration will look for all the world precisely like a trial with a full complement of discovery, sworn witnesses, briefs, and so on.[54] Even then, the process may still be more expeditious than a court since presumably the hearing can be scheduled more rapidly than a judicial calendar would usually permit. But, before embracing arbitration as a means for resolving a dispute the nature of the arbitration process that is contemplated must also be considered to ensure that the desired benefits will actually materialize.

Award. Typically, the decision in an arbitration is only an award: a final result, without elaboration on the facts found or the resolution of the individual issues presented.[55] Sometimes, of course, the decision is supported by a brief recitation of the facts and conclusions.

Finality. One of the primary benefits attributed to traditional arbitration is its finality. Once an award is made it may be subjected to only limited additional review, in court or otherwise.[56] As one leading commentator has said:

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[54] Letter of April 25, 1986 from Chief Administrative Law Judge Naham Litt to Charles Pou; testimony of Stanley Johnson at ACUS hearings, supra note 49.

[55] Goldberg, A Lawyer's Guide to Commercial Arbitration (1979) at 62, 66.

[56] The provision of the U.S. Arbitration Act pertaining to judicial review is extremely limited:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --
>
> > (a) Where the award was procured by corruption, fraud, or undue means.
> >
> > (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
> >
> > (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
> >
> > (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(continued...)

> The essence of the law of arbitration is that the scope of judicial review of arbitration awards is very limited. When the arbitrators are properly selected, conduct an orderly hearing at which all parties have a fair chance to present their proofs and render an intelligible award within the scope of their authority, the courts will confirm and enforce the award.[57]

Or, as another explained:

> The courts will not review the merits of the award and confirmation will not be denied, nor will vacatur be granted, upon a showing of error of law or fact on the part of the arbitrators. The court's inquiry is confined to determining whether the award falls within the authority of the arbitrators, whether in form it reflects the honest decision of the arbitrators and whether the hearing generally comported with accepted standards of due process.[58]

The relationship between courts and arbitration is itself a bit complex and evolving,[59] but its essence is that it is very limited.

Quality Control. The quality control in arbitration -- the reason people use it and have confidence in it -- is the ability to choose the arbitrator and the minimal rules under which the process operates. They obtain in return, an expeditious decision[60] that is within the bounds of acceptability.

But, it is likely that the arbitration proceeding will be more abbreviated than a trial and that some of the judicial procedures designed to ensure ac-

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56.(...continued)

> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. §10.

[57] Goldberg, A Lawyers Guide to Arbitration (2d Ed. ALI 1983) p. 61.

[58] Kreindler, Arbitration Practice Under Federal Law, 18 Forum 348, 357 (1983). And see, 9 U.S.C. § 10, 11.

[59] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc. 105 S. Ct. 3346 (1985); AT&T Technologies, Inc. v. Communication Workers of America, 106 S. Ct. 1415 (1986); Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238 (1985).

[60] The often cited major advantages of arbitration is its expedition and its finality -- it is a means of quickly resolving the dispute within the bounds of acceptability. Statement of Kay McMurray, Director, Federal Mediation and Conciliation Service, and Michael F. Hollering, General Counsel of American Arbitration Association at ACUS Hearings, supra note 49. Thus, if the procedures of an arbitration are unduly complex or if subjected to searching review, its primary value is lost and, absent other needs the matter would likely be better resolved in a full trial.

curacy[61] will not be used. It is, therefore, perhaps inappropriate to expect that arbitration and trials would reach the same result in every case. In some instances arbitration may be viewed as the more accurate because of its flexible nature and its ability to draw on technical expertise. In other instances, the quality control procedures of the courts would be expected to reach a more "accurate" resolution. The question then becomes how much of a spread between the two is acceptable and at what cost.[62]

Benefits/Uses. To summarize and extend, arbitration is a particularly attractive means of dispute resolution when one or more of the following factors are present:[63]

- Time or transactions costs are more important than the "accuracy" of any one decision.[64]
- No decision is of critical importance to any party.[65]
- Technical expertise is important for the decision maker.
- The parties want to choose the basis of the decision, especially if it is to be different from the law that would be applied in a judicial proceeding.
- The parties desire privacy.

Drawbacks. Arbitration is generally not particularly suited where:

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[61] E.g. enforced discovery; findings of fact and conclusions of law; subpoena of witnesses; appeals.

[62] Many people clearly have a knee jerk reaction to arbitration as simply a sophisticated way to "split the difference" between the parties. That is, these people seem to feel impulsively that the arbitrator will not make an honest effort to apply the designated norms to the facts. Similar allegations can, and frequently are, much of virtually any decisional process. It seems a particularly unfortunate bias with respect to arbitration, however. In the abstract, if the parties are careful in selecting the arbitrator, the problem should not arise. More empirically, however, parties familiar with arbitration generally find it a satisfying way of resolving disputes with integrity.

[63] Paths to Justice, supra note 24, at 34; Goldberg, Green, and Sanders, supra note 9, at 8-9.

[64] For example, in a commercial or construction dispute, it may be more important to reach some decision than ensuring that it is "accurate" in the sense of emulating the decision a court would reach. That is necessary so the parties can get on with business based on the decision.

[65] Arbitration is frequently used where many claims need to be resolved expeditiously, no one of which is of fundamental importance to the parties. The parties may in fact integrate a large number of individual claims. For example, a labor union and a company will be parties to an arbitration agreement to resolve a variety of separate disputes. Whatever the variation of the award, "on the average" they would not only be acceptable but preferable to a more intensive form of resolution.

- Uniform results are desired -- reaching similar results in similar cases.
- The development of a "common law" or significant policy that will govern future decisions is importan*
- Maintaining established norms or policies is important;[66] in these cases it is decided that the public policy expressed in established law outweighs the ability of the parties to alter it by selecting the norms or even the forum where the law will be applied.[67]
- Public scrutiny of the process and the result is desired.
- Strict "quality control" is important and cannot be supplied by providing for the technical expertise of the arbiter.
- The matter affects some who are not parties so that they will lack the ability to protect their interests in the outcome.

Administrative Arbitration

The putative benefits of arbitration are attractive indeed. Interestingly, some of the major reasons for the establishment of administrative programs and administrative, as opposed to judicial, adjudication was to tap many of these same virtues. For example, one early case, which exhibited a residual concern and discomfort with agencies, characterized their benefits:

> [T]he obvious purpose of the legislation [is] to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. The object is to secure ... an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent, and consequences of the [issues presented].[68]

The benefits of administrative decisions have been described more recently

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66. Wilco v. Swann, 346 U.S. 427 (1953); Alexander v. Gardener-Denver Co., 415 U.S. 36 (1974) (Title VII claims should be heard de novo in Federal Court even after they have been heard in a grievance arbitration). Katsoris, The Arbitration of a Public Securities Dispute, 53 Fordham L. Rev. 279 (1984); Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668 (1986); Fiss, Against Settlement, 93 Yale L. J. 1073 (1984); Schoenbrod, Limits and Dangers of Environmental Mediation: A Review Essay, 58 N.Y.U.L.Rev. 1453 (1983).

67. Paths to Justice, supra note 24, at 34.

68. Crowell v. Benson, 285 U.S. 22 (1932).

as avoiding judicial delays, application of expertise, and their efficiency.[69] Thus, the reasons giving rise to the current interest in arbitration and other forms of dispute resolution are a resounding echo of the very basis for the establishment of administrative agencies. But now agencies themselves face crushing caseloads[70] and are themselves accused of exhibiting problems similar to those of the courts for which they were to be the cure.[71] It is surely not surprising, therefore, that agencies,[72] Congress,[73] and private organizations[74] are anxious to find new ways to address the difficulties. Since the non-judicial forms of dispute resolution frequently fulfill the promise, their use in or adaptation to the administrative process is to be encouraged.

Dispute resolution techniques can provide an entirely new range of tools for making administrative decisions or even alleviating the need for governmental decisions.[75] Thus, for example, they could take the burden off an overworked adjudicatory process and provide better "justice" at the same time. They can also provide a means of participation far better than that supplied by the APA itself, even under judicial gloss adding requirements.

Some problems that are addressed through command and control regulation can also be better addressed by establishing a dispute resolution mechanism to resolve individual disagreements in a far more personal, factual based means than could result from a generally applicable requirement that may as a practical matter leave the individual in the same situation as before a rule was promulgated.[76] The agency may be in a favorable position to supervise the minimal requirements of the dispute resolution mechanism instead of issuing and then policing a regulation. That process may work to the benefit of all concerned.

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[69] Administrative agencies are both efficient and speedy; and ... [a]gencies provide modern government with the informality of action and decision making usually found in large private business enterprises. Mezines, Stein, and Gruff, Administrative Law (1983) at 1-13.

[70] For example, 20,000 cases were referred to the 27 Federal agencies that employed at least one full-time administrative law judge in 1978. An additional 196,428 cases were referred to the Social Security Administration during the same year. Administrative Conference of the United States Statistical Report for 1976-1978 of Federal Administrative Law Judge Hearings, (1980) at 33.

[71] For example, the average time from complaint to disposition of a black lung case was nearly 1-1/2 years in the period 1976-78; it was more than 2 years for Service Contracts Act cases; more than 4 years for a Maritime Administration case; 2 years for Investment Company Act cases. ACUS, Federal Administrative Law Judge Hearings (1980). To be sure, arbitration would not be appropriate for some of these cases, but the point is that delay, complexity, and mounds of paper have surrounded administrative trials.

[72] CFTC, MSPB

[73] Superfund, PBGC, FIFRA, MSPB.

[74] The arbitration provisions of FIFRA were enacted at the behest of private organizations apparently seeking an expeditious resolution of a disagreement over payment for the use of data used to register a pesticide. See text accompanying note 409.

[75] Just as one need not find fault with a hammer to advocate including a screwdriver and pliers in a tool kit, one need not dwell on the failures of trials to advocate the adoption of ADR techniques. Rather, the techniques are alternative means of making decisions that are better suited in some circumstances.

Varieties of Administrative Arbitration

The discussion that follows is based predominately on the case studies of administrative arbitration that are contained in Appendix II. The arbitration programs that were studied are those of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA);[77] the Multiemployer Pension Plan Amendments Act of 1980[78] that is administered by the Pension Benefit Guaranty Corporation (PBGC); the reparations procedures of the Commodity Futures Trading Commission[79] (CFTC); the Comprehensive Environmental Response, Compensation and Liability Act[80] (Superfund); and the two programs of the Merit Systems Protection Board.[81] While certain patterns through several of the programs, no two are just alike. Together, they span virtually the full range of possible characteristics of arbitration programs. Their attributes are summarized in the accompanying table, and the details are available in Appendix II.

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[76] For an elaboration on this theme of the relationship between dispute resolution mechanisms (DRM) and regulation, see Harter, Dispute Resolution and Administrative Law: The History, Needs and Future of a Complex Relationship, 29 Vill. L. Rev. 1393, 1395-1400 (1984).

[77] 7 U.S.C. § 136 et seq.

[78] 29 U.S.C. § 1381 et seq.

[79] 7 U.S.C. § 18(b).

[80] 42 U.S.C. § 9601 et seq.

[81] 5 U.S.C. §§ 1101-8911.

TABULAR SUMMARY OF VARIETIES OF ADMINISTRATIVE ARBITRATION

CHARACTERISTIC	FIFRA	PBGC	CFTC	SUPERF	MSPB/ AAP	MSPB/ VEAP
Created by rule or statute	Stat	Stat	Rule	Stat	Rule/ stat	Rule/ stat
Use: voluntary or mandatory	Man	Man	Vol	Vol for pri.; man for gov't	Vol.	Vol.
Arbitrator: agency or private	Priv	Priv	Agency	Priv fr. agency list	Agency	Agency
Arbitrator: app'ted or parties choose	Choose	Choose	App't	Choose	App't	App't
Norms applied: agency rule; stat; none specified	None	Existing law	Same as formal	Rule	Same as formal	Same as formal
Proceeding: formal; informal	For	For	Inf	For	Inf	Inf
Record: full w/ tr.: limited; or full if requested (vol).	Vol	Vol	Docs	Full	Vol	Vol
Decision: findings of fact; conclusions of law; award only; full opinion	FF/CL	Fact/ legal basis	Award; brief dis., no find.	Full	Summary of FF/CL	Summary of FF/CL
Agency Review: full limited; none	None	None	Limited	None	Limited	Full
Court Review: limited or arbitrary & capricious standard	Limited, but Tucker Act act.	Unclear: arb & cap or limited	None: "waived"	Arb & cap	Arb & cap	Arb & cap

IV
THE LEGAL ISSUES OF ADMINISTRATIVE ARBITRATION

Some limitations on the administrative use of arbitration need to be borne in mind when considering its use. Some of the problems are conceptual,[82] some are statutory,[83] and some are constitutional.[84] Some are practical:[85] arbitration may be an inappropriate tool to address the issues presented. Its benefits and drawbacks need to be considered when developing a program, and it should not be too quickly embraced without analyzing its utility in dealing with the specific matters to be resolved. With only a few exceptions, most of the obstacles can be overcome. Properly used, arbitration offers the administrative process the same promise it has provided for resolving private sector questions.

Statutory Limitations when the Government is a Party.

The Comptroller General has on several occasions, interpreted an obscure statutory provision with seemingly no relevance whatever[86] to prohibit agency use of arbitration in the absence of specific authorization. This section, enacted in 1909,[87] bars the use of public money for "the pay or expenses of a commission, council, board, or similar group, or a member of that group" unless that commission or board is "authorized by law." The Comptroller General has consistently found this prohibition applicable to arbitration panels established to determine the rights of the United States. The Comptroller General has also viewed Congress's express authorization of agency use of arbitration to indicate that agencies lack authority to submit disputes to arbitration in the absence of such authorization.

The Attorney General reviewed the legislative history of this prohibition on the use of funds to pay unauthorized commissions soon after its enactment. The Attorney General described the breadth of this prohibition when considering the Secretary of War's appointment of a committee of architects to assist in overseeing the development of the landscape surrounding Niagara Falls. The statute ascribing this duty to the Secretary did not expressly authorize such a committee. Nevertheless, the Attorney General approved appointment of this committee, arguing that "public officers have not only the power expressly conferred upon them by law, but also possess, by necessary implication, such powers as are requisite to enable them to discharge the duties devolved upon them."[88] The Attorney General determined that the prohibition on paying for unauthorized commissions was not intended to affect this implied authority. The legislative history shows that the bill as originally introduced would have prohibited all payments to all commissions or boards not "in specific terms authorized by

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[82] See text at note 140.

[83] See text at note 86 et seq.

[84] See text at note 106 et seq.

[85] See text at note 66.

[86] 31 U.S.C. §1346.

[87] Mar. 4, 1909, Ch. 299 § 9, 35 Stat. §1027.

[88] 27 Op. Atty. Gen 432, 436 (June 26, 1909).

Congress." This language was later modified. The statute as enacted prohibits payment to boards not authorized by law. The Attorney General interpreted this legislative history to mean that commissions need not be authorized by specific statute but only have to be authorized generally. The opinion states "it would be sufficient if [commissions] authorized in a general way by law."[89] Thus, the Attorney General found that the Secretary of War was authorized by implication to appoint a committee of landscape architects to assist him in performing his duties of administration over Niagara Falls.

The Comptroller General adopted the Attorney General's analysis when he approved the payments made to the committee of landscape architects involved in the administration of Niagara Falls.[90] The Comptroller General reaffirmed this conclusion when it authorized the payments to a board of experts appointed by the Secretary of Interior to assist in administration of Indian schools. The Comptroller General stated, "If a board of experts is necessary to accomplish the purposes indicated, the employment of the members thereof would be authorized under the provisions of this appropriation. Such a board would be authorized by law within the meaning of the act of March 4, 1909."[91]

Despite these initial opinions, the Comptroller General soon began to read this prohibition more restrictively. In 1914, he refused to authorize the use of public funds to pay for the services of a commission which devoted itself to a matter it was not authorized by law to consider. The Mexican Border Commission had been authorized to negotiate boundary disputes. The comptroller determined that this Commission could not be paid for its work in negotiating the United States' and Mexico's rights to the use of water from the Rio Grande.[92] The Comptroller General also read the prohibition to bar payments to boards which were not clearly authorized by law. In 1925, the Comptroller General barred payment for a board of consulting engineers employed to assist in construction of the Coolidge Dam. The statute authorized payment for individual consultants but did not explicitly authorize the appointment of a board of consultants.[93] In another case, the Comptroller General determined that the Navy could not pay its share of the cost for arbitration of a contract dispute with a manufacturer because such a board was not authorized by law.[94]

In 1928, the Comptroller General applied the prohibition to an agency's submission to an arbitration panel. In reviewing a proposed lease between the government and a private company, the Comptroller General determined that the government could not accept a clause agreeing to arbitrate all disputes concerning the condition of the leased property at the end of the lease term. The Comptroller General rejected the arbitration clause for two reasons. First, he argued that the act of March 4, 1909[95] prohibited the payment of boards not authorized by law, stating simply that the arbitration board called for under the lease was unauthorized. Second, the Comptroller General argued that the government's provision for contract dispute resolution precluded resort to an alternate forum. The Comptroller General argued that the existence of established procedures for resolving disputes with the government precluded the use of arbitration. The Comptroller General states, "provision having been made by law for the adjustment of claims that may arise under government contracts, there is no power or authority in any administrative or contracting officer of the Government, by means of a provision in a contract, to establish or provide for a different procedure for the adjustment of such claims."[96] These two views were subsequently relied upon to invalidate arbitration clauses in two additional contracts.[97]

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[89] 27 Op. Atty. Gen at 437.

[90] 16 Comp. Dec. 282 (Nov. 2, 1909).

[91] 16 Comp. Dec. 422, 424 (Jan. 10, 1910).

[92] 20 Comp Dec. 643, March 18, 1914.

[93] 5 Comp. Gen. 231 (August 21, 1925).

[94] 5 Comp. Gen. 417 (Dec.9, 1925).

The Comptroller General subsequently returned to the broad view of the term authorized by law reflected in earlier opinions. In 1942[98] he quoted extensively from the Attorney General's 1909 opinion.[99] Criticizing subsequent opinions, the opinion held "Subsequent decisions applying a more strict rule on the basis that the creation of commissions, boards, and similar bodies must be specifically authorized by statute may not have taken cognizance of the earlier history of the matter."[100] Concluding that the question of authorization did not bar government agreement to the inclusion of an arbitration clause in a lease of government property, the Comptroller General turned to the more general question of whether the existence of a prescribed method for resolving disputes against the government precluded agencies from adopting alternative means for resolving disputes.

The Comptroller General determined that there is no bar to the use of a board or panel to determine the factual question of reasonable value. Under the terms of the lease at issue, the government could only gain from the arbitration award as the lease provided that the value of the property could not be fixed at any rate less favorable than the original terms of the lease. The Comptroller General approved the inclusion of the arbitration clause under these conditions since the government could not lose under the process and the arbitrators were not deciding any questions concerning the legal liability of the government. These arbitrators were merely making a factual determination of the value of certain rental space.

The Comptroller General has refused to extend its acceptance of the use of arbitration beyond the function of fact finding or appraising value. In 1953, he decided the Navy lacked authority to submit to arbitration as prescribed in a contract it had signed with a Swedish company. After reviewing several nineteenth century court of claims decisions, the Comptroller General decided, "The conclusion seems warranted that in the absence of statutory authorization, either express or implied, officers of the Government have no authority to submit or to agree to submit to arbitration, claims which they themselves would have no authority to settle and pay."[101] He also concluded that Congress's express authorization of arbitration in some statutes, indicates that agencies generally lack the authority to submit to arbitration. The Comptroller General states, "The action of the Congress,... in authorizing the heads of executive departments to arbitrate certain specific and well defined matters might well, indicate ... that the executive branch has no general or inherent power to submit claims against the United States to Arbitration."[102] The Comptroller General's opinion of agency use of arbitration remains unchanged. The opinion is not based upon any statute, but is an inference drawn by the Comptroller General from Congress's explicit authorization of arbitration in several statutes.

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[95] 35 Stat. 1027.

[96] 7 Comp. Gen 541, 542 (March 3, 1928).

[97] 8 Comp. Gen. 96 (Aug. 28, 1928) and 19 Comp. Gen 700 (Feb. 3, 1940).

[98] 22 Comp. Gen 140 (July 10, 1942).

[99] Supra, note 90.

[100] 22 Comp. Gen. 140, 143.

The Comptroller General's most recent opinion concerning agency use of arbitration dates from 1978.[103] The Federal Trade Commission requested an opinion concerning the agency's decision to resolve a factual dispute with a contractor through binding arbitration. The Comptroller General held that such substitution for prescribed dispute resolution procedures would be improper, although an arbitrator who is in fact an appraiser is a desirable adjunct to the normal dispute resolution procedures. The Comptroller General also reiterated his position that he was approving only arbitration's use to determine the fact of reasonable value in situations in which the arbitrator did not impose any obligation on the government or leave questions of legal liability for the arbitrator's determination. The Comptroller General approved of the FTC's use of arbitration "to render a determination as to the reasonable value of work performed by the defaulted contractor ... so long as the prescribed disputes procedure and provisions for judicial review incorporated therein are not displaced."[104]

Thus, as a result of this line of holdings, the government cannot be bound by an agency's arbitration program unless it is specifically authorized by statute or is limited to factfinding. Absent these, an agency's arbitration must be nonbinding and hence the functional equivalent of a minitrial.

Given the erratic interpretation of the statute read to ban the appointment of arbitrators unless specifically authorized and the relatively this justification of a ban based on Congress's inclusion of specific provisions for arbitration, it seems appropriate for Congress to clarify this matter. In particular, an executive branch official should be allowed to use arbitration for making decisions within his or her authority if they believe that would be a beneficial means of doing so. Such authority would not, of course, pre-empt the existing authority of the Comptroller General and the General Accounting Office for "determin[ing] whether payments of public funds are warranted by applicable law and available appropriations."[105] Thus, an arbitral award would still be subject to a determination by GAO that its terms can be lawfully met.

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[101] 32 Comp. Gen 333, 336 (Jan. 27, 1953).

[102] Id.

[103] B-191484, May 11, 1978.

[104] Id. at 3.

Article III

The courts were clearly jealous of their prerogatives during the development of administrative law, and announced the need for judicial, not administrative, resolution of important matters, especially facts.[106] The need was raised to the Constitutional level. With the growth of the administrative state, the acceptance of decisions made by agencies and a limited form of judicial review -- to ensure that the determinations are based on substantial evidence -- also grew. The early doctrines gradually died.[107] Indeed, agency decisions became sufficiently accepted that few thought much about the old tension or that only Article III courts could hear and resolve some types of issues. Interestingly, the limitation on the use of entities other than courts to resolve matters has been rekindled recently. While it does not affect most administrative arbitration, the issue has arisen and it does define the outer boundaries of what can be done in it. The new requirements must clearly be taken into account when considering whether to develop a new administrative program.

Northern Pipeline Co. v. Marathon Pipe Line Co[108] held that the Bankruptcy Act of 1978 wrongfully delegated federal judicial power to individuals who are not Federal judges. Judges appointed under the Bankruptcy Act are not guaranteed the safeguards of life tenure and irreducibility of salary deemed essential to judges appointed under Article III. The arbitration program of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) was challenged on the similar grounds that the use of an arbitrator denied the parties their right to have the issue resolved by an Article III court.[109] The Court upheld the constitutionality of private arbitrators determining the amount of compensation a second or "me-too" pesticide registrant must pay to a prior registrant when EPA uses data submitted by the first registrant in support of the second pesticide registration on the grounds that it is a "public dispute."

The Court acknowledged Congress's discretion over the adjudication of public rights over one hundred years ago:

> There are matters, involving public rights, which may be preserved in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as

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[105] Steadman, Schwartz, and Jacoby, Litigation with the Federal Government (2nd Ed. 1983) at 205.

[106] Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); Crowell v. Benson, 285 U.S. 22 (1932).

[107] Davis, Administrative Law and Government at 69; Estep v. United States, 327 U.S. 114, 142 (1946).

[108] 458 U.S. 50 (1982).

[109] Thomas v. Union Carbide Agricultural Products, 105 S. Ct. 3325 (1985).

> it may deem proper.[110]

FIFRA illustrates that the public rights doctrine extends to disputes between private parties. FIFRA empowers arbitrators, who are not Article III judges, to adjudicate disputes between pesticide registrants over amounts of compensation due as a result of EPA's use of previously submitted data. The Court notes that this right to compensation is statutorily based and that pesticide registrants lose any claim to compensation based upon state property law when they submit the data to EPA with knowledge of FIFRA's data use provision.[111]

Although this right to compensation concerns private parties, the Court determined that this right carries many attributes of a public right since Congress created the right as part of a comprehensive regulatory scheme governing pesticide registration intended to safeguard the public health. The Court justified Congress's delegation to arbitrators by noting it could have granted EPA the power to decide the value or compensation due but instead chose to vest arbitrators with this authority. The use of this alternative does not raise this delegation of Congress's Article I legislative authority to the level of encroaching upon judicial power so as to violate Article III.

FIFRA does provide a role for the judiciary in its regulatory framework, however. It authorizes judicial review of an arbitrator's decision in cases of fraud, misconduct and misrepresentation. In Thomas, the Court found that this scope of judicial review satisfies the need to ensure an "appropriate exercise of the judicial function" because it provides judicial protection against "arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under governing law."[112]

The Court summarized the scope of Article III limitation upon the delegation of decisionmaking power:

> Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary. To hold otherwise would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme.[113]

Thus, the public rights doctrine is a broad, flexible doctrine which authorizes the delegation of quasi-judicial, decisionmaking authority to non- Article III judges when Congress adopts innovative approaches to the resolution of disputes as part of a regulatory scheme.

The latest explication of the nature of issues that agencies, and hence

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110. Murray's Lessee v. Hoboken Land, 18 How. 272, 284 (1856).

111. 105 S. Ct. at 3335, citing Ruckelshaus v. Monsanto, 104 S. Ct. 2862 (1984).

112. 105 S. Ct. at 3339.

113. 105 S. Ct. at 3340.

administrative arbitration, can hear came as recently as the end of last term. The D.C. Circuit held the Commodity Futures Trading Commission could not resolve a counterclaim involving state law in a proceeding arising out of the same transaction that was clearly within its jurisdiction because doing so would transcend Article III limitations.[114] The Supreme Court reversed, pointing out that Article III has two purposes: one is to protect an independent judiciary from encroachment by other fora, and the second is to afford parties the right to have their controversies heard by Article III judges.

As to the first, the Court found the important factors to be considered are

> the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[115]

The Court sustained the agency's resolution of the state law claim on the ground that the courts would still be called upon to enforce the order; the legal rulings would be subject to de novo review; the range of issues presented is narrow; and, the scheme did not oust the courts of jurisdiction since the parties could still proceed there instead of before the agency. The Court found, therefore, that the program was not a threat to separation of powers.

With respect to whether the parties could "waive" their rights to an Article III court, the Court held in reviewing the CFTC program that

> as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.[116]

Thus, Article III does not appear to raise any limitations on the use of arbitration to resolve public disputes. Nor is it a limit for resolving private disputes so long as consent is freely given by the parties and the courts maintain at least some role in reviewing and enforcing the order.

Article III could conceivably pose some restriction on the extent to which Congress could require mandatory arbitration as a way of resolving private disputes since the very limited judicial review could be regarded as an impermissible intrusion into the prerogatives of the judiciary. That courts are called upon to enforce the otherwise private award may not be sufficient basis of judicial involvement to protect this aspect of the separation of powers requirement. The Court's reasoning in Thomas, however, that the limited review of arbitral awards is sufficient to provide the requisite level of judicial protection necessary to meet the standards of Article III would seem to apply with equal vigor to private actions. Thus, even the mandatory arbitration of private disputes appears to meet the standard develop in Schor.

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[114] Schor v. Commodity Futures Trading Commission, 740 F.2d 1262 (D.C. Cir. 1984), vacated, 105 S. Ct. 3325, reinstated, 770 F.2d 211 (D.C. Cir. 1985), rev'd, 106 S. Ct. 3245 (1986).

[115] Id. at 3258.

[116] Id. at 3256.

Congress has authorized the use of arbitration as a means for adjudicating disputes involving public rights in a number of statutes. For example, the Randolph-Shepard Vending Stand Act[117] grants a preference to blind vending stand operators seeking sites on Federal property. Disputes concerning this program may be submitted to an arbitration panel convened by the Secretary of Education upon request of the individual, the state agency administering the program or by the Secretary. The arbitration panel's award is reviewable in the Federal District Court as if it were final agency action under the Administrative Procedure Act.

Other instances of Congressional authorization of arbitration include CERCLA or Superfund,[118] the Flood Insurance program,[119] Department of Defense design bid competitions,[120] patent interference cases[121] and the largest federal sector use of arbitration, the Civil Service Reform Act's requirement of arbitration of employee grievances.[122]

Administrative arbitration programs have been assailed on several additional constitutional grounds. That lower courts have sustained some of the challenges indicates their potential seriousness. Properly designed and used, however, administrative arbitration fits comfortably within the constitutional framework--at least as much as agencies themselves.

Article II: Requirement for Executive Decisions

Some issues may be so intertwined with government policy that they cannot be decided by a private arbitrator. Buckley v. Valeo[123] held that the "performance of a significant governmental duty exercised pursuant to a public law"[124] can only be discharged by an Officer of the United States appointed in accordance with the Appointments Clause of the Constitution.[125] The argument has been raised as to whether a private arbitrator could be authorized to make a binding decision in a matter in which an agency must make a final, binding decision, such as in rulemaking or revoking a permit.[126] Even in the case of revoking a permit, however, it would not seem inappropriate if the parties -- the agency, the permittee, and the interested interveners -- agreed to resolve a contested issue by submitting it to arbitration.[127] Doing so would seem analogous to stipulating a factual premise of the action. The ability of the arbitral decision to withstand challenge from a non-participating third party would likewise appear to be similar to the ability of a disgruntled third party to challenge a stipulation. In both instances, the decision is made by the government official, albeit in the one he has agreed to be bound by the arbitrator's decision. The officer or government employee presumably will have made that decision on the ground that it is in the government's overall interest to arbitrate the claim as opposed to consume resources to chase the issue through a more elaborate process.

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[117] 20 U.S.C. Sec. 107. See discussion infra at note 132.

[118] 42 U.S.C. Sec. 9612(b)(4)(G).

[119] 42 U.S.C. 4083.

[120] 10 U.S.C. 277(e).

[121] 35 U.S.C. §135(d). An advance notice of proposed rulemaking to establish procedures for the arbitrations was published at 50 Fed. Reg. 2294 (1985).

[122] See 5 U.S.C. 4303 and 7512.

[123] 424 U.S. 1 (1976).

[124] Id. at 140-141.

[125] Article II, Section 2, Clause 2.

The real question would seem to concern the extent to which the non-executive branch official is called upon to make policy determinations. As the quote from Buckley indicates, it is the **significant** decisions that must be made by government employees, not all decisions. Thus, the restriction would appear to bar the arbitrator's deciding major policy questions, not the factual basis of such a decision or a mixed question of law and fact in which the norms are already relatively well developed. Not only are these areas constitutionally doubtful, they are the very areas where the utility of arbitration is limited in the first instance. The Article II limits, therefore, do not appear to be a practical concern.

Delegation to Private Parties

A closely related issue is whether there may be limitations on the ability of the government to delegate powers to a private individual or institution. As the discussion above makes clear, the use of private arbitrators to make decisions closely affiliated with the government has been upheld on several occasions.[128] Although the law on this issue is far from clear,[129] there are undoubtedly **some** limits. Thus, the more central the decision is to an issue that only the government can make, the more likely it is that an agency must be in a position to review the matter before it can be final.

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[126] Memorandum of April 24, 1986 for Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, from Samuel A. Alito, Jr., Dep. Ass't Attorney Gen., Office of Legal Counsel, Administrative Conference Recommendations on Federal Agencies' Use of Alternative Dispute Resolution Techniques.

[127] Indeed, EPA is considering doing just that with respect to the permitting of hazardous waste facilities. Robinson, U.S. Environmental Protection Agency Institutes Alternative Dispute Resolution in its Enforcement Program, 18 Dis. Res. News 6 (ABA Cmte. on Dis. Res. 1986). Memorandum of December 2, 1986 to Ass't Administrators, Regional Administrators, Enforcement Policy Work Group, Draft Guidance on the Use of Alternative Dispute Resolution Techniques in Enforcement Cases. The draft recognizes the statutory limitations, however, and limits the use of binding arbitration to factual situations. Id. at 4.

[128] Thomas v. Union Carbide Agr. Products Co., 105 U.S. 3325 (1985); Schweiker v. McClure, 456 U.S. 188 (1982).

[129] OLC Memorandum, supra note 126, citing Davis, Administrative Law Treatise 3.12 (2d Ed. 1978).

As in the discussion of the need for executive branch decisions, the extent to which this is a problem would seem to be directly correlated with the extent to which the arbitrator is called upon to make policy decisions, and that is precisely the area in which the utility of arbitration is questionable. For virtually all areas in which arbitration may be attractive, therefore, it does not raise constitutional difficulties.

Due Process

The manner in which reimbursements under Medicare are determined has been criticized as denying participants due process. Part A of the program provides insurance coverage for the cost of institutional health services, while Part B is a voluntary supplementary insurance program covering a percentage of costs for other medical procedures. Both parts are administered by private insurance carriers. Under the programs, claims for payment or reimbursement are submitted to the carrier. If the request is denied, the beneficiary may request a reconsideration. HHS' Health Care Financing Administration decides the matter for Part A and a different employee of the carrier makes the decision as to Part B. Under Part A, only controversies involving more than $100 may be appealed to the Secretary and judicial review is available only if the amount in dispute is $1,000 or more. Under Part B, the decision is final and non-reviewable. Thus, under Part B, a private "arbitrator" is assigned to decide the matter, and the decision is not subject to judicial review.

The use of a private individual to make decisions that are, to some degree or another, administrative decisions is certainly anomalous. The question would logically arise whether the types of decisions that are referred to the private arbitrators are such that they should be decided by government officials. The use of the private carriers to make the decisions in Medicare Part B was challenged as a denial of due process. The District Court agreed "insofar as the final, unappealable decision regarding claims disputes is made by carrier appointees ...."[130] In applying the test of Mathews v. Eldridge,[131] the court concluded that administrative law judges must hear the appeals. The Supreme Court reversed.[132] It held that the deciding employees did not have a conflict of interest since their salaries and any resulting claims are paid by the Government, not their employers. Moreover, the nature of the decision is determined by statute and regulation. Thus, the court found there is no reason to believe those making the decisions are not qualified to perform their tasks and hence that their margin of error is any greater than that for administrative law judges.[133] Thus, the court has approved private schemes at least to the extent they operate under procedures specified by the agency.

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[130] Schweiker v. McClure, 503 F. Supp 409, 418 (N.D. Cal. 1980).

[131] 424 U.S. 319 (1976). In determining the nature of a hearing that is minimally required by due process, the court is to balance the private interest affected by the official action; the risk of erroneous deprivation of such an interest through the procedures used; and the probable value of additional procedural safeguards; against the government's interest, including the function and expense of additional or substitute procedural safeguards.

[132] Schweiker v. McClure, 456 U.S. 188 (1982).

The need for minimum procedural safeguards was stressed in a subsequent case[134] involving the question as to whether an oral hearing must be held for claims for less than $100 or whether a paper hearing would be sufficient. The court laid down guidelines that must be followed if the oral argument was to be avoided, especially the adequacy of notice, access to the evidence on which the decision was made, and the ability to speak with someone who knows and understands the basis for the decision.

A second answer to the seeming conflict between using private arbitrators for public decisions is that the decisions are not entirely public: While the decisions may implement an administrative program and bear an intimate connection to it, the decisions are not those of the agency and are basically for the resolution of a controversy between private individuals and organizations.[135]

Unconstitutional Taking

FIFRA was also challenged that the arbitration program constituted an unconstitutional taking of private property in violation of the Fifth Amendment. The Court rejected the challenge in Ruckelshaus v. Monsanto.[136] Monsanto alleged that EPA's use of its data for the benefit of another applicant's pesticide registration effected a taking of Monsanto's property without just compensation.[137] The district court sustained the challenge.[138] The Supreme Court reversed, finding that while Monsanto and other data submitters may have a property interest in data submitted to EPA, these companies cannot allege that a taking occurs when EPA uses this data in a manner which was authorized at the time the data was submitted.[139] The Court noted, however, that under the statutory scheme in effect between 1972 and 1978 data submitters could have a legitimate claim that documents submitted under the designation "trade secrets" between 1972 and 1978 were improperly taken when used for the benefit of other pesticide registration applicants.[140] Such an allegation would depend upon the actual amount of compensation received in arbitration. The Court found that

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[133] 456 U.S. at 200.

[134] Gray Panthers v. Schweiker, 716 F.2d 23 (D.C. Cir. 1983).

[135] This is not the case in some of the Superfund cases in which a claimant disputes the Administrator's denial of liability or the amount claimed from the fund.

[136] 104 S.Ct. 2862 (1984).

[137] 104 S. Ct. at 2871.

[138] Monsanto Co. v. Acting Administrator, United States Environmental Protection Agency, 564 F. Supp. 552 (ED Mo. 1983).

[139] 104 S. Ct. at 2872-2877.

[140] 104 S. Ct. at 2877-2879.

Monsanto had not yet had any issue of compensation submitted to arbitration and thus no issue of taking had yet arisen.[141]

The Court held, however, that any data submitter seeking to contest an arbitrator's compensation award retains the right to challenge the amount of compensation in the United States Court of Claims.[142] The Court ruled that the Tucker Act offers a potential remedy to any data submitter whose data is used or taken by EPA for the benefit of another applicant. Thus, any data submitter who is dissatisfied with an arbitration decision may sue the United States in the Court of Claims under the taking clause on the ground that it did not receive just compensation for the use of its data.

Standardless Delegation

FIFRA has also been assailed as an unconstitutional delegation of legislative power because the statute is alleged to offer so little guidance as to the standards an arbitrator should apply in administering the data compensation program.

The Supreme Court did not address this issue in Monsanto[143] because Monsanto's claim concerning the constitutionality of the arbitration scheme was not ripe for review since it had not been subject to any arbitration. In contrast, the district court[144] had found the arbitration provision arbitrary and vague. Similarly, the district judge in Union Carbide Agricultural Products v. Ruckelshaus[145] remarked that FIFRA represents a standardless delegation of power to arbitrators.

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[141] 104 S. Ct. at 2878.

[142] 104 S. Ct at 2880-2882. The Tucker Act, 28 U.S.C. § 1491 provides that any individual who believes that the United States has taken his property may bring this claim for compensation before the United States Claims Court. The Tucker Act states:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort.

The Court held that in the absence of specific legislation addressing their interaction, the Tucker Act remedy and FIFRA's data compensation scheme must coexist. Thus, the Court interpreted FIFRA as "implementing an exhaustion requirement as a precondition to a Tucker Act claim. That is, FIFRA does not withdraw the possibility of a Tucker Act remedy, but merely requires that a claimant first seek satisfaction through the statutory procedure." 104 S. Ct. at 2881.

[143] 104 S. Ct. 2862 (1984).

[144] Monsanto v. Acting Administrator, United States Environmental Protection Agency, 564 F. Supp. 552 (ED Mo. 1983).

The court in Sathon, Inc. v. American Arbitration Association[146] refused to issue a declaratory judgment as to the standard an arbitrator must apply in determining the amount of compensation due. Sathon sought a declaratory judgment to determine whether it must pay to an original data submitter a share of the cost of producing the data used or whether it must pay a share of the value of its use. The court sustained the vague criteria of "compensation," saying:

> It is up to Congress to say what standards are to be applied or to delegate this authority. There is nothing in the statute (or the regulations promulgated thereunder) relating to the standard to be applied in such proceedings or providing for judicial intervention in such matters.[147]

Another court concurred that arbitrators under this scheme are not required to apply an particular allocation formula, and that the absence of a specific standard was not unconstitutionally impermissive as a denial of due process or excessively broad delegation of authority.[148]

Conclusion: Properly Executed Arbitration Programs are Constitutional

The courts which have interpreted the Multiemployer Pension Plan Amendments Act of 1980's[149] (MPPAA) arbitration provisions thus far have been called upon to determine the Act's constitutionality and have not actually reviewed an arbitration decision under the Act. MPPAA has been upheld against assertions that its provisions violate standards of due process;[150] deny employers access to an impartial tribunal;[151] commit a taking of property without just compensation;[152] violate the Seventh Amendment's provision for trial by jury;[153] and constitute a violation of Article III of the Constitution by vesting federal judicial power in arbitrators who are not federal Article III judges.[154]

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[145] 571 F. Supp. 117 (SD NY 1983), rev'd sub nom., Thomas v. Union Carbide Agricultural Products, 105 S. Ct. 3325 (1985).

[146] No. 83 Civ. 6019 (U.S. District Court N.D. Ill., March 30, 1984) 20 ERC 2241.

[147] 20 ERC 2245.

[148] PPG Industries, Inc. v. Stauffer Chemical Co., 637 F. Supp. 8 (D.D.C. 1986).

[149] P.L. No. 96-364, 94 Stat. 1217, codified at 29 U.S.C. Sec.1381 et seq.

[150] See, Pension Benefit Guaranty Corp v. R.A. Gray, 104 S.Ct. 2709(1984) (Court held constitutional MPPAA's retroactive imposition of withdrawal liability.)

[151] See discussion in text, Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc, 749 F. 2d 1396 (9th Cir. 1984); Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502 (D.C. Cir. 1984); Peick v. Pension Benefit Guaranty Corp. 724 F. 2d 1247 (7th Cir. 1983).

Administrative arbitration programs have been attacked on a broad range of constitutional grounds. Thus far all the challenges have been rebuffed. It would therefore appear that such a program will pass constitutional muster and can decide any issue an agency can so long as they adhere to at least minimal procedures, avoid major policy matters, and are subjected to at least some judicial review -- even the narrow standard of the Arbitration Act.

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152. Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc., 749 F. 2d 1396, 1406 (9th Cir. 1984) (taking clause does not prohibit Congress from readjusting contractual relationships of private parties); accord, Peick v. Pension Benefit Guaranty Corp., 724 F. 2d 1247, 1274-1276 (7th Cir. 1983).

153. Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502, 1511 (D.C. Cir. 1984); Peick v. Pension Benefit Guaranty Corp., 724 F. 2d 1247, 1277 (7th Cir. 1983).

154. Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, 749 F. 2d 1396, 1404-1406 (9th Cir. 1984).

V
HYBRID PROCESS

As should be clear by now, several of the administrative arbitration programs are actually hybrids between administrative and private sector processes.[155] They typically are used to resolve issues that arise **because of** an administrative program and are administered at least in part by an agency, but they are not part of the agency itself. That is, the decision reached is not an agency order. The agency, however, is charged with defining the process to be followed. Sometimes, as in Superfund, the agency is a party, but in others, such as PBGC and FIFRA, it is not. It seems likely that prior to the interest in alternative means of dispute resolution the issues submitted to arbitration would have been resolved by the agency itself in some sort of trial type hearing. For example, prior to FIFRA's amendment, EPA made the determination as to how much compensation is due; now the arbitrator does.[156] Since the programs are so intimately connected to the agency and implement part of an agency program, they have some of the attributes[157] of agency action. Moreover, in some of the programs, the arbitration is the only forum available for resolving the matter. It is therefore unlike voluntary arbitration and more like an administrative or judicial hearing in which the process is imposed on the parties. Thus, administrative arbitration might sometimes be thought of in conceptual terms as similar to an administrative hearing.

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155. FIFRA, PBGC, Superfund.

156. See discussion infra at note 404.

157. E.g. judicial review for some, but not all of them.

But, these programs also have some of the attributes of private sector arbitration, such as a reduced record, a private arbitrator, the parties' having a role in choosing the person who will decide, and decisions required by rule to be reached far more quickly than is customary for administrative litigation.

The administrative arbitration programs are, therefore, to a very real extent a hybrid, having both public and private characteristics. Sometimes the two collide. The difficulty is made more confusing by no two being alike.

The Arbitrators.

Arbitrators are basically selected in one of three ways in administrative arbitration programs, although a fourth way is clearly possible. The first is the private analog in which the parties participate in selecting the arbitrator. They may agree directly on an individual to serve as the arbitrator. Barring that, and the procedure contemplated in several of the programs, the parties are tendered a list of potential arbitrators. Each party may then either strike a designated number of individuals from the list or rank those on the list according to preference. The arbitrator is then chosen from those remaining on the list or from those with the highest overall ranking.[158]

The PBGC is a fairly typical example as to how arbitrators are selected. Under the PBGC final rules, the parties shall select an arbitrator within 45 days of initiation of arbitration or at a mutually agreed time. Several comments to the proposed rule on this issue suggested allowing the parties to select the arbitrator before initiation of arbitration. PBGC rejected the suggestion because it believes that post-initiation selection will reduce the risk of jeopardizing the arbitrator's neutrality.[159]

In its proposed rules, the PBGC invited comments on the usefulness of a PBGC-maintained roster of qualified arbitrators. The PBGC agreed with the majority of comments that such a roster would duplicate those already maintained by private organizations. PBGC will not, therefore, implement the proposal.[160] The American Arbitration Association (AAA) maintains a roster of qualified arbitrators from which it makes selections after parties in dispute have had an opportunity to rank the acceptability of the candidates.[161] The PBGC noted in the preamble of the final rules, however, that plan sponsors may still maintain their own rosters without violating preselection restrictions.[162]

The PBGC rules do not state specific qualifications for the arbitrator because, after considering comments on the issue, the PBGC determined that the arbitrator would assuredly be qualified because the parties are required to select him by mutual agreement.[163]

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[158] Superfund; see discussion at note 567. FIFRA; see discussion at note 416.

[159] 50 Fed. Reg. 34686.

[160] 50 Fed. Reg. 34679.

[161] AAA rules - Section 12.

[162] 50 Fed. Reg. 34680.

Upon accepting an appointment, each arbitrator must disclose to the parties any "circumstances likely to affect his impartiality."[164] If any party determines that the arbitrator should be disqualified on the ground that he is not impartial, he must request, within 10 days, that arbitrator withdraw. If the arbitrator agrees that he is no longer impartial, he must withdraw from the proceeding and notify the parties of his reasons.[165] One comment to the PBGC proposed rule on this issue argued that disqualification would be too easy under the rule, while another argued that the rule should provide the parties with a mechanism to compel the arbitrator to withdraw. The PBGC concluded that its final rule has struck a reasonable balance.[166]

If a selected arbitrator declines appointment or, after accepting, withdraws, dies, resigns, or is for some reason unable to perform his duties, the parties shall select another arbitrator within 20 days of receiving notice of the vacancy.[167] PBGC initially proposed allowing 45 days for selecting a new arbitrator but reduced the limit because the parties will have had already identified suitable candidates during the original selection.[168] The parties may seek designation and appointment of an arbitrator in a U.S. District Court if they are unable to do so within the time limit of the rules.[169]

The second way is for the arbitrator to be a private individual who is imposed on the parties without their participating in the selection. This process is used in any of the case studies, and it is followed in the administration of the Medicare program administered by the Department of Health and Human Services.

The third means of obtaining an arbitrator is for the agency to appoint an agency official to serve that function. The CFTC and the MSPB follow this model. This is unlike the typical binding commercial arbitration, but quite similar to the non-mandatory court annexed programs. The dispute in both instances is submitted to the arbitrator only with the parties' concurrence. Thus, the parties can decide whether the nature of the dispute and their respective needs are such that this procedure is in their interest to pursue. Hence, although some of the protections normally afforded in arbitration is lacking, the parties are in a position to make the choice of whether or not to invoke the process. Indeed, the Medicare decision would indicate that the process should be fully acceptable even if imposed on the parties, so long as minimally acceptable procedures are followed in reaching the decision.

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163. 50 Fed. Reg. 34679.

164. § 2641.3(b).

165. § 2641.3(c).

166. 50 Fed. Reg. 34681.

167. § 2641.3(d).

168. 50 Fed. Reg. 34681.

169. § 2641.3(e).

The fourth means of appointing an arbitrator would be for the parties to choose from among a list of agency personnel. The Chicago office of the Merit System Protection Board are selected in this way,[170] and arbitrators for Superfund are selected from an agency approved list of private individuals.

Norms and Precedents.

Some administrative arbitration programs are directed to apply existing law and precedent.[171] In such cases, they are alternative procedures to the same end as a more formal process.[172]

Several of the programs are explicitly non-precedential, in that an arbitral decision in a matter cannot serve as resolving any issue for any purpose other than that before the arbitrator.[173] The CFTC believes the lack of precedential or res judicata effect is a positive incentive to use the arbitration process since a decision will not have a potentially damaging collateral effect.[174] Several comments on the PBGC's proposed rule indicated, however, that they thought compiling the awards would provide valuable guidance for future decisions.

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170. Adams and Figueroa, Expediting Settlement of Employee Grievances in the Federal Sector, (Report to ACUS Evaluating MSPB's Appeals Arbitration Procedure) (1985) at 31.

171. PBGC, CFTC, MSPB. Whereas the arbitrator in the PBGC is to apply existing law, the agency has noted that the regulation establishing the program does not tell the arbitrator just where or how to find it. 50 Fed. Reg. 34,681.

172. For example, in reviewing the difference between arbitration under a collective bargaining agreement and review by the Merit Systems Protection Board, the court said:

> While undoubtedly hoping to encourage employee selection of the grievance-arbitration process, Congress did not wish that choice to be made on the basis of a predictable difference in substantive outcome. To the contrary, it envisioned a system that would, as between arbitration and MSPB procedures, 'promote consistency ... and ... avoid forum shopping.'" Thus, "the arbitrator's authority can be no less than the MSPB's but also ... it can be no greater." Devine v. Pastore, 732 F.2d 213, 216 (D.C. Cir. 1984).

And see, Cornelius v. Nutt, 105 S.Ct. 2882 (1985).

173. CFTC. For example, in Superfund, 40 C.F.R. 305.51(c) provides:

> No award or decision shall be admissable as evidence of any issue of fact or law in any proceeding brought under any other provision of CERCLA or under any other provision of law. Nor shall any prearbitral settlement be admissable as evidence in any such proceeding.

174. Nelson, CFTC's New Rules: Some Innovative Approaches to Adjudication; 9 Ad. L. News 1 (1984).

Unlike the others, the FIFRA program does not provide any guidance to the arbitrator as to the norm to apply. Because of its lack of standards, it has been attacked as an impermissive grant of legislative power to the arbitrator, and at least two courts have agreed.[175] Others, however, have not.[176] The matter is likely to be raised again until a definitive resolution is made.[177] Whether permissible or not, such standardless arbitration appears inadvisable. Arbitration is generally not appropriate for developing a "common law" or other definitive norm that is to provide guidance for future conduct.[178] Without existing standards and without such a common law, decisions would run the risk of being arbitrarily ad hoc when criteria should be developed. The major issue -- whether compensation should be based on cost of developing the data or its value once developed -- is not likely to be resolved by the expertise of the administrator, nor supplied by reference to an external standard. At minimum, such a program should authorize the affiliated agency to issue rules to establish the major guidelines that will be applied.

Record and Explanation.

The Administrative Procedure Act and many of the cases imposing the requirement for "some sort of hearing"[179] rely largely on paper for minimal quality control: They require a decision to be based on a record and be explained as to what facts the decision maker believes flow from that record, as well as the conclusions of law. This process permits a reviewing court or other body to look over the shoulder of the decision maker to ensure an acceptable level of accuracy. A major advantage of arbitration is its speed and finality, with the quality control provided by other means. In it, paper is a means to the decision but largely ancillary for purposes of oversight. The nature and purpose of the "record" is therefore different in arbitration as opposed to a judicial or administrative hearing.

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175. Monsanto v. Acting Administrator, 564 F. Supp. 552 (E.D. Mo. 1983), rev'd on other grounds sub nom. Ruckelshaus v. Monsanto Co., 104 U.S. 2862 (1984); Union Carbide Agricultural Products v. Ruckleshaus, 571 F. Supp 117 (S.D.N.Y. 1983), rev'd sub nom, Thomas v. Union Carbide Agricultural Products, 105 S. Ct. 3325 (1985).

176. Sathon, Inc. v. American Arbitration Association, 20 ERC 2241 (N.D.Ill. 1984).

177. The issue was pressed in the Supreme Court in Thomas v. Union Carbide Agricultural Products Co., 1055 S. Ct. 3325 (1985) but the Court decided it

> was neither adequately briefed nor argued to this Court and was not fully litigated before the District Court. Without expressing any opinion on the merits, we leave the issue open for determination on remand.

105 S. Ct. at 3340.

178. Although addressing problems with settlements and not arbitration, the need for establishing and adhering to norms is raised by Edwards, Fiss, (1984), and Schoenbrod, all supra, note 66.

179. Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1316 (1975).

Thus, for example, in most of the administrative arbitration programs that were surveyed, a full record could be generated at the request of a party but are not as a matter of course. To be sure, the arbitral decisions turn on written materials that are disgorged through some sort of discovery and introduced at a hearing but, absent a request, transcripts of the hearing are typically not kept nor are the decisions explained with the rigor of an administrative decision.[180] The decision is usually a review of the factual and legal basis of the decision, but the rules typically indicate it is to be more abbreviated.

If administrative decisions are to be fully reviewed in another forum,[181] they may need a fuller explanation and a more fully developed record than is customary in private sector arbitration. That, of course, comes at the expense of time and cost; and, indeed, subsequent review also comes at the cost of finality.

Privacy.

One of the reasons parties sometimes choose private sector arbitration is that the record and the decision itself can be kept private and confidential. To the extent the arbitration is viewed as part of an administrative program, the expectation would be that they should be accessible to the public, or conducted "in the sunshine." In those programs in which the program is a part of the agency itself and results in an agency decision,[182] the Freedom of Information Act would apply and hence the record would be subject to full public access. The others, however, do not result in an agency decision. Thus, if the agency is not a party,[183] FOIA would not apply.[184] In that case, the proceeding likely

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180. This point was emphasized by the D.C. Circuit in a case reviewing the nature of judicial review of an arbitrator's decision concerning disciplinary proceedings against a government employee:

> If arbitration becomes simply another level of decision making, subject to judicial review on the merits, arbitrators may begin to decide cases and write opinions in such a way as to insulate their awards against judicial reversal -- producing opinions that parrot the appropriate statutory standards in conclusory terms, but suffer from a lack of reasoned analysis. Such a shift from the arbitral model, in which decision makers are free to focus solely on the case before them rather than on the case as it might appear to an appellate court, to the administrative model, in which decision makers are often concerned primarily with building a record for review, would substantially undercut the ability of arbitrators successfully to resolve disputes arising out the employment relationship. Devine v. White, 697 F.2d 421, 436 (D.C. Cir. 1983).

181. See infra concerning agency and judicial review.

182. MSPB, CFTC

183. PBGC, FIFRA

(continued...)

could remain confidential absent overriding rules or statute. If, of course, the agency is a party, as in Superfund, then FOIA would apply to its records and hence likely that of the entire proceeding.

Review by the Agency.

To the extent the arbitration results in an agency order, the traditional relationship between the decision made by the hearing officer and the agency would provide for either appeal to the agency or discretionary review by the agency on its motion. One of the attributes of voluntary arbitration, however, is its finality. Thus, again, the two concepts collide in concept.

The Merit Systems Protection Board, for example, initially provided for agency review only to address harmful procedural irregularity or a clear error of law. While more review than under commercial arbitration, it was more limited than usual. In response to views of the parties that typically appear before it, the Board changed its Appeals Arbitration Procedure into the Voluntary Expedited Appeals Procedure in part to provide full appeal to the agency.

The CFTC's arbitration program provides that the agency may review a decision on its own motion to determine that it is not the result of any fraud, partiality, or other misconduct. In this case, the agency is providing the same narrow review typically accorded voluntary arbitration.

To the extent the arbitral award becomes an agency order, it would seem appropriate for the agency to have some power to review to ensure it meets minimal levels of acceptability. To ensure the benefits of expedition and finality, however, that review should be quite narrow, probably akin to the standard of judicial review under the arbitration act. Thus, an agency should review only for gross deviation from policy or procedure, which is the administrative analog of the award's being outside the scope of the arbitrator's authority.

The hybrid programs,[185] however, have no review by the agency. That is likely stems from a view that the very reason for the arbitration is that the matter is largely a private sector dispute that does not require agency action.[186]

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184. Even if a private arbitrator is retained by an agency, it would not appear that the arbitrator's records that are developed in a hearing are agency records for purposes of FOIA. They would seem analogous to records developed by a government contractor to which the government has access, in which case the Supreme Court held that they are not agency records. Forsham v. Harris, 445 U.S. 169 (1980). Moreover, if the record remain in the possession of the arbitrator, the agency is not obligated to retrieve them. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980).

185. PBGC, FIFRA, Superfund.

186. Superfund does not fit this model. Its arbitration program applies standards developed by the agency and determines the agency's liability. Thus, it is clearly not a "private" dispute. The fact that the decision is not made by

(continued...)

Hence there is no reason for the agency to be involved in reviewing let alone deciding.

Judicial Review

There are essentially three forms of judicial review of administrative arbitration decisions: none; limited, akin to traditional arbitration; and some variant of the APA's arbitrary and capricious standard.

No Review: Waiver. If parties decide to use an arbitration program to resolve an existing dispute, one component of that election could be a waiver of any right to seek the judicial review normally accorded administrative action. That is, by opting into arbitration, the parties would opt into its full ramifications, including its finality. The CFTC programs follow this approach. The Supreme Court recently sustained such waivers of judicial review on the ground that the right to have the dispute heard by an Article III court is a personal one, and hence it may be waived.[187]

The extent to which such waivers are enforceable when the election is made **before** the dispute arises is open to question, at least in some instances. The Supreme Court has held that a predispute agreement to arbitrate any claim that would arise between a securities broker and its customer is not enforceable since it could derogate rights provided by the Federal securities laws.[188] Although the case has been questioned and limited,[189] it continues to stand for some limitation on the ability of a person to sign away his or her rights to an administrative or judicial proceeding. Moreover, the Court has followed this line of reasoning in other cases. It recently held that even though some aspects of a matter may be arbitrated, an arbitral award could not preclude a judicial role in protecting the federal statutory and constitutional rights that Section 1983 is designed to

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186.(...continued)
an agency official may indicate a distrust for the ability of separation of functions doctrines to result in impartiality while still wanting to maintain enough control over the process that it will result in expeditious, acceptably decisions; the alternative would be to rely on the courts, and the agency could not set the agenda there.

[187] Schor v. Commodity Futures Trading Commission, 106 S. Ct. 3245 (1986).

[188] Wilko v. Swann, 346 U.S. 427 (1953).

[189] See, Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238 (1985). The lower courts split as to Byrd's effect, with some holding that preenforcement agreements to arbitrate securities disputes were enforceable, Halliburton & Assoc., Inc. v. Henderson, Few & Co., 774 F.2d 441 (11th Cir. 1985), while others disagreed and continued to apply Wilko's traditional limitation, Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520 (9th Cir. 1986).

The Supreme Court has granted certiorari to resolve the matter. McMahon v. Shearson/American Express, 788 F.2d 94 (2d Cir.) cert. granted, 107 S. Ct. 60 (1986). The resolution of this case should have a significant effect on the extent to which predispute agreements to arbitrate matters involving of public policy are enforceable.

safeguard.[190] Thus, neither full faith and credit nor a common law rule of preclusion of review would permit a court to accord res judicata effect to an unappealed arbitration award.

The combined teaching of these cases is that if a dispute involves important public rights, the court may invalidate an agreement to subject them to binding arbitration and hence a party could still have the matter heard in a traditional manner.[191] In other instances, however, the agreement is enforced, and the matter is referred to arbitration, with its limited review.[192] While technically not "waiver" cases in that such an agreement would preclude judicial review altogether and arbitration has some judicial review, the cases do mark an outer boundary of the ability of parties to sign away their rights before a dispute arises.

Limited. Judicial review of traditional arbitration awards is very narrow. The United States Arbitration Act[193] directs courts to enforce the awards except (a) where it was procured by corruption, fraud, or undue means; (b) where there was evident partiality or corruption in the arbitrators; (c) where the arbitrators were guilty of misconduct in the conduct of the hearing to the extent the rights of any party were prejudiced; or (d) where the arbitrators exceeded their powers assigned under the agreement.[194]

The standard applied in FIFRA tracks this approach. It provides for judicial review only in the case of "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator...."[195] The Court has acknowledged that limited judicial review is permissible[196] and has upheld it against a challenge that it constitutes a wrongful delegation of judicial power to the arbitrator.[197] The Supreme Court left open the possibility, however, that a dissatisfied data provider could sue in the Court of Claims for a "taking" under the Tucker Act.[198] Thus, the Court seems to indicate that it does not regard the arbitral award as a judicial finding, since presumably there would be no "taking" if the amount were judicially determined.[199] This may result in the anomalous result that a dissatisfied data submitter could obtain judicial review of the arbitral award by suing in the Court of Claims, whereas the data user may have difficulty securing a similar review.

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[190] MacDonald v. City of West Branch, 104 S. Ct. 799 (1984). See also, Alexander v. Gardner-Denver, 415 U.S. 36 (1974).

[191] Other aspects of an arbitration agreement may be enforced, however. Thus, when a securities agreement provided that "Any controversy between you and the undersigned arising out of or relating to this contract or breach thereof shall be settled by arbitration" the portion arising under the Federal law was heard by a court since the dealer assumed it would not be referred to arbitration, but that arising under state law was ordered arbitrated. Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238 (1985).

[192] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 105 S.Ct. 3346 (1985).

[193] 9 U.S.C. § 10.

[194] As "a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses M. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983).

[195] 7 U.S.C. Sec. 136a(c)(1)(D)(ii).

[196] Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts. See, e.g., 5 U.S.C. §§ 701(a)(1), 701(a)(2); Heckler v. Chaney, 105 S. Ct. 1649 (1985); United States v. Erika, Inc., 456 U.S. 201, 206, (1982) (no review of Medicare reimbursements); Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 18 (1983) (administrative agencies can conclusively adjudicate claims created by the (continued...)

Arbitrary or Capricious. The MSPB and Superfund programs both provide for "arbitrary and capricious" scope of judicial review.[200] For example, the Superfund rules provide:

196.(...continued)
administrative state, by and against private persons); Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L. J. 197 (same).

Thomas v. Union Carbide Agricultural Products, Inc., 105 S. Ct. 3325, 3334 (1985).

[197] Thomas v. Union Carbide Agricultural Products, Inc., 105 S. Ct. 3325 (1985).

[198] Ruckelshaus v. Monsanto, 104 S. Ct. 2826 (1984).

[199] The Court has made quite clear that arbitration is not a judicial proceeding subject to full faith and credit. Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238 (1985).

[200] Under the Randolph-Sheppard Vending Stand Act, 20 U.S.C. Sec. 107, blind persons who are licensed as vendors by state agencies may receive preference in obtaining vending stands on federal property. An individual who is dissatisfied with the state agency's actions may obtain a hearing on the state level. If he or she remains dissatisfied, he or she may request the Secretary of Education to establish an arbitration panel to hear the dispute. A state agency may also request arbitration whenever it believes a federal agency or department is not complying with the Act.

The arbitration is the exclusive remedy for an alleged grievance, notwithstanding Congress's saying it "may" be used. Hence someone who believes he or she has been denied such a preference must submit the complaint to arbitration before pursuing the matter in court. That is, it has been held that the arbitration is an administrative remedy that must be exhausted before a court will entertain the complaint. Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986).

While the awards are "final and binding on the parties," 20 U.S.C. Sec. 107d-1, they are "subject to appeal and review as a final agency action" under the APA, 20 U.S.C. Sec. 107d-2. Thus, the arbitrary or capricious standard applies to these arbitrations. The court in Georgia Department of Human Resources v. Bell, 528 F. Supp 17 (N.D. Ga. 1981) reviewed an award under 5 U.S.C. Sec. 706 as final agency action, as if it had been made by the agency itself.

> The award or decision of [an arbitrator] shall be binding and conclusive, and shall not be overturned except for arbitrary or capricious abuse of the [arbitrator's] discretion.[201]

The scope of review under PBGC is more complicated. One part of the statute indicates that the arbitrator's findings of fact are to be presumed correct subject to rebuttal only by a clear preponderance of the evidence.[202] This would appear to provide for de novo judicial determination of issues of law and a review of facts under a "clear preponderance of the evidence" standard. The matter is confused, however, by another section of the Act which directs that, to the extent consistent with the Multiemployer Pension Plan Amendments Act of 1980, the awards are to be enforced under the limited provisions of the United States Arbitration Act. At least one court has held that only the limited scope of review provided commercial arbitration is available.[203] Most courts, however, have interpreted the Act as providing for the broader review.

One case draws an important analogy between the arbitration and administrative agencies.[204] It argues that "judicial deference to the arbitration process [under the Act] is mandated by the same policies that underlie the principles of judicial deference to administrative agencies."[205] Thus, the decisions are reviewable, like those of an agency, to determine whether the applicable law was correctly applied and whether the findings comport with the evidence. Like an agency, the arbitrator will be someone skilled in pension and labor matters and thus likely to fashion a resolution superior to a court in matters within that expertise.

An MSPB case wrestled with the relationship between an arbitration award and the court in words reminiscent of the origins of the "hard look" doctrine:[206]

> For judicial deference to arbitral decisions to have meaningful application, the reviewing court must be confident that the arbitrator has undertaken a thorough review of each aspect of the ... action.[207]

Thus, the standard that has evolved in several of the administrative arbitration programs is for a court to review an award as if it were a decision of an agency. This standard may be appropriate in those cases where the arbitration is

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201. 40 C.F.R. Sec. 305.51; 42 U.S.C. Sec. 9612(b)(4)(G).

202. 29 U.S.C. Sec. 1401(b)(2), (c).

203. Washington Star Company. v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502 (D.C. Cir. 1984).

204. IAM National Pension Fund Benefit Plan C v. Stockton TRI Industries, 727 F.2d 1204 (D.C. Cir. 1984).

205. Id. at 1207.

206. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert den. 403 U.S. 923 (1971).

207. Local 2578 AFGE v. GSA, 711 F.2d 261, 267 (D.C. Cir. 1983).

mandatory,[208] in that it is the only means available for resolving the dispute. In that case, the fuller judicial review may be an important protection. Even in this case, however, the courts should recognize the benefits that were supposed to be derived from the arbitration scheme, as opposed to reliance on administrative adjudication under the APA, and hence accord deference to the arbitral award or some other form of limited review so long as there is an indication of the proper standards' being applied.[209] Perhaps, the proper standard of judicial review should be no different than that of agency action before it became more intrusive: a rational basis test.

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[208] Mandatory arbitration seems inappropriate except in those cases when the benefits of a trial type hearing are clearly and substantially outweighed by the need to (1) save time or other transaction costs or (2) have a technical expert resolve the issues. Otherwise, the "arbitration" is really stripped clean adjudication and the hallmark of arbitration -- its voluntariness -- is lost.

[209] Devine v. White, 697 F.2d 421 (D.C. Cir 1983).

VI

CONCLUSION WITH RESPECT TO ADMINISTRATIVE ARBITRATION

Some of the administrative arbitration programs track their private sector analogs quite closely. The Commodity Futures Trading Commission's program, for example, applies to cases where time and transaction costs probably outweigh the need for procedural rigor, and the decisions are final.[210] Other programs, however, do not fit so well. The FIFRA program, for example, has the finality normally accorded arbitration, but it would appear that at least in some instances a large amount of money would be at stake and there are no guidelines for how the decision will be made. Moreover, that lack will probably not be rectified by the expertise of the arbitrator. Some norm -- whether through statutory prescription, agency rule, or developed common law -- would be in order. Were it established, the matter would then be better suited for arbitration since it would be more a matter of accounting or otherwise applying existing criteria. In either event, the margin for error would be substantially reduced. As it stands, any need for expedition probably does not outweigh the need for a standard.

Most of the administrative arbitration programs have two significant differences between them and traditional arbitration: First, this use is not voluntary, either before or after a dispute has arisen, but rather it is the only available means of making the decision.[211] Second, the greatest difference between most of the administrative arbitrations and private sector commercial arbitration is that the arbitral award is subjected to a scope of judicial review very similar to that of an administrative action, even when the award itself is not an agency order.[212]

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[210] Compare this with the criteria at notes 63-67.

[211] Moreover, this relationship between the courts and the arbitration is different from that of typical court annexed arbitration where there is a trial de novo before the court, sometimes with disincentives against frivolous appeals.

Even though each program differs from the others, what seems to be evolving is a form of "administrative arbitration" in which the agency is at best passive. The adjudication -- in the form of the arbitration -- is outside the agency, but the relationship between it and the court is similar to that of the court and an agency with respect to informal adjudication. Once that is recognized, it provides a new tool for addressing a range of issues that do not need the full rigor of APA trial type hearings but more judicial oversight than customarily applied in arbitration. Most seem to contemplate that the decision itself will be relatively narrow and able to apply existing, well defined standards.[213]

Some of the other programs are only variants of the modified procedure that have been used previously.[214] In these, there is very little that is new. In the others, however, an interesting hybrid has been born that may have potential for substantial growth.

Unfortunately, "arbitration" is a sufficiently pliable term that it can be used to describe virtually any process in which a third party makes a decision. It would be helpful if there could be concurrence on some minimal criteria a program must have before legitimately being called "arbitration" even in the administrative sense. A first cut at that might be:

- abbreviated discovery;
- parties' participation in the selection of the arbitrator;
- application of a pre-existing norm that is defined by either statute or a rule issued by the implementing agency;
- once norms are applied, discretion is relatively narrow;
- strict time limits for decision;
- abbreviated decision, with a discussion of its factual and legal basis but no findings;
- limited review, Arbitration Act or designated as "arbitrary and capricious" but with a recognition of the nature of the process as defined in

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[212] Some courts have said with respect to the PBGC program that the arbitration is a form of "exhaustion" of remedies that is a precursor to a judicial determination. See, e.g. Peick v. Pension Benefit Guaranty Corp., 742 F.2d 1247 (7th Cir. 1983). Even with this perspective, however, the arbitration is the assigned first step in the decision process.

[213] Superfund. Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc., 749 F. 2d 1396 (9th Cir. 1984).

[214] Edles, The Hearing Requirement in the 1980s, 31 Fed. Bar N and J 435 (1984).

the criteria.[215]

Since these procedures are more limited than those provided by the APA, the process should be used only where the general criteria of arbitration are met.[216]

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[215] Thus, the court should assure itself that the arbitrator applied the right norms and performed in accordance with the requirements, but it would not attempt to force the arbitrator to replicate either a judicial or APA trial type hearing. In either case, the benefits would be lost.

[216] See supra, at notes 63-67.

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RESOLVING GOVERNMENT CONTRACT DISPUTES: WHY NOT ARBITRATE?

By Timothy S. Hardy[*] and R. Mason Cargill[*]

> By accepting the disputes clause in his contract, the contractor bears the interim financial burden and gives up the right of rescission and the right to sue for damages. What he receives in return is the Government's assurances of speedy settlement and of prompt payment, not payment delayed for months or . . . for years.
>
> —Justice Blackmun
>
> *S&E Contractors, Inc.* v. *United States*[1]

SINCE JULY 1964 Avondale Shipyards in New Orleans has been building twenty-six destroyer escorts for the U.S. Navy. It will complete performance of this long-term contract with delivery of the last ship this winter. When the Navy will complete its performance of the contract—and pay all it owes for the ships—is anyone's guess. Avondale filed a $100 million-plus contract claim in 1969. To date the Navy has yet to issue a contracting officer's opinion, the first major procedural step in dispute resolution.[2]

Avondale is not suffering in isolation. Lockheed Shipbuilding in Seattle also built some destroyer escorts, and submitted a $100 million-plus claim to the Navy in 1968. A contracting officer's decision was issued in May 1973 only after Lockheed filed a complaint with the Armed Services Board of Contract Appeals (ASBCA).[3] Hearings before the ASBCA began this fall, but if past experience is any indication, it will be another two years before the Board issues a decision.[4]

Shipbuilding contractors now despair of receiving the "speedy settlement and prompt payment" that Justice Blackmun said was their due in *S&E Contractors*.[5] Outstanding against the Navy are more than $1.1 billion in claims more than two years old.[6] This large backlog is often mentioned as a primary example of the deteriorating relationships between the Navy and private industry.[7]

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[1] 406 U.S. 1, 20 (1972) (Blackmun, J., concurring).

[2] *Hearings before the Seapower Subcomm. of the House Comm. on Armed Services*, 93d Cong., 2d Sess. at 822-23 (1974) [hereinafter cited as *Seapower Hearings*] (testimony of Edwin Hartzman, President, Avondale Shipyards, Inc., and M. Lee Rice, President, Ogden Corp., Aug. 2, 1974).

[3] Complaint, Lockheed Shipbuilding and Construction Co., ASBCA #18460 (June 30, 1973). The Lockheed complaint alleges two causes of action: (1) that the Navy and Lockheed reached an agreement to settle the claim for $62 million in 1971; or, in the alternative, (2) on the merits of the claim, Lockheed is entitled to $160 million. A decision on claim (1) is expected in early 1975. If Lockheed loses, hearings on the merits will follow, and two to three more years will probably be required for a decision by the Board. In a very recent development, the Lockheed claim was forwarded to the Justice Department for a fraud investigation. *Wall Street Journal*, Jan. 9, 1975, at 7, col. 1.

[4] See n.29 *infra*.

[5] *Supra* n. 1 at 20.

[6] Included in this total are Avondale's claim for $142 million (filed in 1969), General Dynamics Quincy's for $211 million (filed in 1970-71), Litton Ingall's for $376 million (filed January 1972) and for $101 million (filed in 1971) and Lockheed's for $165 million (filed in 1968-69). See *Seapower Hearings, supra* n. 2 at 1475-79 (testimony of William Middendoff. Secretary of the Navy, Sept. 26, 1974).

[7] "Civilian Shipbuilders 'Mutiny' Against Navy," U.S. News & World Rep. at 51. (Sept. 9, 1974); *Seapower Hearings, supra* n. 2 at 1012 (testimony of Fred O'Green, President, Litton Industries, Aug. 13, 1974); at 653 (testimony of Edwin M. Hood, President, Shipbuilders' Council, July 26, 1974).

The basic procedures that the Navy uses to resolve contract disputes are the same as those used by most Government agencies. Decisions are issued by contracting officers and by boards of contract appeals before most claims are presented to the judicial system. This internal agency review has long been advocated in Government procurement as a desirable alternative to direct judicial resolution. Congress, the Courts and commentators[8] have all agreed that internal review processes have the potential to provide fast, flexible, low cost, and fair treatment of contractors. As one House committee was told:

> The purpose of the procedure which gives contractors the right to appeal to this Board is to provide an administrative method of settling these disagreements speedily and fairly, without the necessity of resorting to the courts.[9]

In interpreting the standard disputes clause, the Supreme Court has accepted the congressional and executive intentions:

> The disputes clause included in Government contracts is intended, absent fraud or bad faith, to provide a quick and efficient administrative remedy and to avoid "vexatious and expensive and to the contractor often times ruinous litigation."[10]

The administrative procedures have twin goals: fairness and efficiency. Little empirical evidence exists on the substantive fairness of existing procedures, and no attempt will be made here to explore whether contractors are currently receiving the decisions they merit. The Navy experience is one dramatic example, however, of the current system's failure to fulfill the second goal, efficiency. Speed, informality and inexpensiveness, three important aspects of efficiency, are intended results of the dispute settlement procedures that have not always been achieved.

The Navy's inability to resolve contract disputes with shipbuilders is but the largest example of more general failings of Government contract dispute procedures. The Commission on Government Procurement found that processing of small claims was often slow and costly. Two-thirds of the small businesses told the Commission that they would not bother to appeal an adverse contracting officer decision to a board of contract appeals on claims of less than $5,000. The Commission found that 33 percent of all disputes took more than six months to resolve at the contracting officer level; and, of those disputes appealed to boards of contract appeals, 70 percent took more than six months to resolve, 15 percent more than two years.[11]

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[8] See Frenzen, *Some Thoughts on the Similarity of the Boards of Contract Appeals and Commercial Arbitration*, 3 PUB. CONT. L.J. 56, 77 (1970); Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROB. 39, 40-41 (1964); Kipps, *The Right of the Government to Have Judicial Review of a Board of Contract Appeals Decision Made Under a Disputes Clause*, 2 PUB. CONT. L.J. 286, 296 (1969).

[9] *Hearing on H. Res. 67 Before Subcomm. for Special Investigations of House Comm. on Armed Services*, 85th Cong., 2d Sess. at 794-95 (1958). For Army, Navy and Air Force views on the ASBCA's goals, see Shedd, *supra* n.8 at 61.

[10] S & E Contractors, Inc. v. United States, *supra* n. 1 at 8. As Justice Blackmun pointed out in the quotation from *S & E* cited at the beginning of this article, a contractor gives up his right to suspend or halt performance under the standard disputes clause in Government contracts. Contractors must abide by the directions of Government officials when those directions are given and leave the resolution of disputes to subsequent determination. As Justice Blackmun implies, and other commentators have argued, it is therefore "common fairness" for the Government, in exchange, to guarantee an expeditious means for compensating contractors for work required of them although not specified in the contract. Shedd, *supra* n.8 at 40.

[11] *Procurement Commission, infra* n.12, Vol. IV at 3-4, 11-12, 16-19. Small claims are the bread and butter of the boards of contract appeals. If the early 1970's, twenty-two percent of all claims to boards were for under $1,000, fifty-one percent under $10,000 and sixty-three percent under $25,000. *Id.* at 15.

Numerous suggestions have been made to improve the disputes process,[12] but one possible alternative settlement device—private arbitration—has received little attention. Several Comptroller General decisions—none more recent than 1953—held that arbitration by the U.S. Government was illegal.[13] Those decisions have not gone unchallenged,[14] but they seem to have stifled effectively any attempt to use in Government contract cases this highly popular means of settling private disputes. Outdated arguments that it is illegal for the Government to submit contract claims to private arbitration should be discarded so that sound policy decisions can be made by contrasting arbitration's advantages and disadvantages with those of other proposed settlement procedures.

The remainder of this article will consider the desirability, legality and feasibility of using private arbitrators to settle Government contract disputes. Description of the existing dispute procedures, analysis of their failings, and suggestion of the relative advantages of private arbitration will be followed by consideration of the legality and practicality of submission of Government contract disputes to arbitration.

Would Arbitration be Desirable?

Existing Disputes Procedures

Under existing contracts disputes procedures, each Government agency gets first crack at resolving disagreements, and, if it fails, final decisions are made within the judicial system. The head of each executive department has, incident to his general authority to run his department, the authority to decide contract disputes.[15] Most agency heads have delegated their author-

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Lack of speed in resolving claims can be costly to a contractor, not only because of litigation expenses, but also because of limited interest penalties against the Government. Until 1972, the Government paid no interest on amounts it was ordered to pay through disputes resolution. *Id.* at 29. On more recent contracts, the Government continues to pay interest only from the date a claim was filed with a board of contract appeals, which may be long after the work for which payment is being received was completed. Defense Procurement Circular No. 97 (Feb. 15, 1972); FPR 1-1.322, ASPR 7-104.82. As Shedd, *supra* n.8 at 41, points out, "a contractor could easily be thrown into bankruptcy by delay in payment over a dispute; and it is little consolation to such a contractor to know that years later his trustee in bankruptcy will obtain a judgment against the government in an action at law."

[12] *Report of the Commission on Government Procurement* [hereinafter cited as *Procurement Commission*], Vol. 4 at 1-4, 11-34 (1972); L. Spector, *Contract Disputes and Remedies: Are Current Procedures for Redress of a Contract Grievance Against the Government Fair and Efficient?* 5 Nat. Cont. Mgt. J. 1 (1971).

[13] 32 Comp. Gen. 333 (1953); 8 Comp. Gen. 96 (1928); 7 Comp. Gen. 541 (1928); 6 Comp. Gen. 140 (1926); 5 Comp. Gen. 417 (1925); see also 19 Comp. Gen. 700 (1940).

[14] R. Braucher, *Arbitration under Government Contracts*, 17 Law & Contemp. Prob. 473 (1952); S. Fine, *Validity of Arbitration Provisions in Federal Procurement Contracts*, 9 Miami L.Q. 451 (1955). The lively dispute in the 1940's over Government contract arbitration can be followed in Note, *Arbitration and Government Contracts*, 50 Yale L.J. 458 (1941); Anderson, *The Disputes Article in Government Contracts*, 44 Mich. L. Rev. 211 (1945); Kronstein, *Business Arbitration—Instrument of Private Government*, 54 Yale L.J. 36 (1944). The 1940's dispute over the legality of arbitration of Government contract claims was precipitated by introduction of three bills in Congress to authorize arbitration, S. 2350 and H.R. 7163, 77th Cong., 2d Sess. (1942) and H.R. 3665, 78th Cong., 1st Sess. (1944). None of these bills were ever acted upon. They were introduced in response to inclusion of arbitration clauses in several thousand wartime defense contracts; even though prevailing legal opinion was that such clauses were beyond agency statutory authority and were not binding on the Government. Greske, *Settlement of War Contract Disputes*, 29 A.B.A.J. 13 (1943); Greske, The Law of Government Defense Contracts §§158-62 (1943). No judicial interpretations of these contract clauses have been discovered.

[15] United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1875); United States v. Adams, 74 U.S. (7 Wall.) 463 (1868); see Shedd, *supra* n.8 at 42-43.

ity to a board of contract appeals.[16] Government contracts generally provide that disputes will first be decided by the Government contracting officer with a right of appeal from his findings to the boards of contract appeals.[17] There is thus a two-step process within the agency with the decision-makers at each step being agency employees.[18] Unsatisfied contractors also have the right to appeal internal board decisions to either U.S. District Courts or to the Court of Claims depending upon the amount in controversy.[19] The difficulties in reaching satisfactory disputes settlements have occurred at both the contracting officer and board of contract appeals levels, and it is at those levels that arbitration by outside experts appears a reasonable alternative.

Each Government contract has assigned to it a contracting officer. He is in charge of administering the contract, insuring that its terms are fulfilled, issuing change orders and resolving contract disputes.[20] He is intimately familiar with the progress of a contract even before a contractor submits a claim. On a large, complex contract, such as those involved in Navy shipbuilding, submission of a claim will initiate a substantial review process.[21] A team of engineers, accountants and lawyers will attempt to determine whether legal liability exists, and, if so, what additional compensation is owed. Based on the findings of this team, a contracting officer's decision will be issued. Often, time lapses of two-to-five years have occurred between filing of a claim and issuance of a contracting officer decision in Navy shipbuilding.[22] Considerable disagreement can and has occurred between Navy teams and contractors over the type and amount of information needed to assess the validity of a claim. In many cases, two, three and even five successive Navy teams have reviewed and re-reviewed each claim. Meanwhile, the contractor may have submitted and resubmitted his claim documentation up to five times either voluntarily or as required by the Government.[23]

The contracting officer is an integral part of the Government procurement team. In most instances, because he is cognizant of the background of the claim, he is well-equipped to assess its merits and order payment of it, if warranted. When such is the case, there can be great value in requiring an initial determination of the validity of a claim by the contracting officer.

On the other hand, in many instances the contracting officer's naturally subjective viewpoint may hinder expeditious disputes settlement. The contractor may be attacking Government procurement practices. He may be claiming inadequate specifications or informal instructions given to him during the life of a contract that caused him to incur additional costs. The contracting officer will often naturally be reluctant to admit Government errors that reflect badly on either himself or his superiors. He may also feel budgetary pressures that limit his ability to compensate contractors for Government-caused additional costs.[24] One solution for a contracting officer may therefore be to delay decisions or to grant decisions that evaluate contractors' claims at unreasonably low levels. Requiring the contracting officer to be the first level decision-maker in dispute settlement thus has the potential advantage of encouraging a knowledgeable person to deal expeditiously with the issue, but also the possible disadvantage of lack of objectivity that may prevent achievement of this goal.

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[16] See, e.g., Charter of the ASBCA, ASPR Appendix A, Part 1, Sec. 1 (1973).

[17] See, e.g. ASPR 7-103.12 Disputes, ASPR 7-602.6(a) Disputes. In general, exhaustion of these internal procedures is required before resort to the courts is allowed if the dispute arises under the contract. See Sachter, *Resolution of Disputes Under United States Government Contracts*, 2 Pub. Cont. L.J. 363, 371 (1969); n.32 *infra;* and Megyeri; *Pandemonium in the Administrative Resolution of Government Contract Disputes*, 75 W.Va. L. Rev. 121, 123-124 (1972-1973).

[18] For further description, see *Procurement Commission, supra* n.12, Vol. 4 at 11-22.

[19] 28 U.S.C. §§1346, 1491 (1970).

[20] See *Procurement Commission, supra* n.12, Vol. 4 at 11-21; ASPR 1-406 Contract Administration Functions.

[21] For a detailed description of the process, see "Shipbuilding Claims and Their Evaluation by the Navy," Feb. 7, 1974, an unclassified staff paper by the Counsel of the Naval Ships Systems Command and his Deputy Counsel for Claims. For a general description of the contracting officer's role, see Shedd, *supra* n.8 at 64-66.

[22] See notes, 1-7 *supra*.

[23] *Seapower Hearings, supra* n.2 at 1120-22 . . . (testimony of F. Trowbridge vom Baur, Sept. 16, 1974.)

A contracting officer's decision to grant only a small percentage of the claim generally leads the contractor to appeal to the board of contract appeals, in the case of the Navy, the ASBCA.[25] The boards of contract appeals were established as the distinctive non-judicial internal agency reviewers that were to fulfill the goal of providing flexible, speedy, inexpensive disputes resolution. Prior to 1962, the boards were free to adopt practices aimed at achieving this goal with an understanding that a *de novo* review of any claim was available in the judicial system if the contractor was dissatisfied with a board's decision.[26] In 1963, however, the Supreme Court ruled in the first of several decisions that *de novo* review of such decisions was unavailable in the judicial system.[27] The much more limited scope of review in the courts has provided incentive for the boards of contract appeals to provide sufficient due process to insure completeness and fairness. As a result, during the past fifteen years, Government boards of contract appeals have adopted most of the formal procedures of federal trial courts. They require formal pleadings, allow each appeal a *de novo* review, provide many discovery tools to the parties, receive extensive briefs, hold lengthy hearings and do their utmost to accumulate a complete record.[28] It has become cus-

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[24] The contracting officer may realize that budgetary problems will be avoided if the dispute eventually goes to judicial determination. Payment of Court of Claims judgments under $100,000 is made not from agency accounts, but from funds provided by the Permanent and Definite Appropriations Act. 31 U.S.C. §724a (1970). For judgments over $100,000, the Department of Treasury must obtain funds from Congress. *Procurement Commission, supra* n.12, Vol. 4 at 30. See also Megyeri, *supra* note 17 at 134-136.

[25] The caseloads of the boards of contract appeals vary greatly. The ASBCA disposes of more than one thousand cases per year, handling contract disputes of not only the armed forces, but also those of State, HEW, AID, USIA, the National Science Foundation and the Defense Nuclear Agency. Three other boards handle more than one hundred cases annually: Corps of Engineers, Veterans Administration and General Services Administration. Less than one hundred cases per year are handled by the boards at the Atomic Energy Commission, NASA, Postal Service, and departments of Agriculture, Commerce, Interior, Labor and Transportation. Gantt & Burg, *The Atomic Energy Commission Board of Contract Appeals—An Experiment in Government Contract Disputes*, 6 Pub. Cont. L.J. 167, 168 (1974). Many of the problems discussed in this article are peculiar to the large, ASBCA-type, boards. See note 29 *infra*.

[26] Contractors, too, were secure in feeling that if a board of contract appeals really blundered, *de novo* review would right the wrong. Sachter, *supra* n.17 at 363.

[27] United States v. Bianchi & Co., 373 U.S. 709 (1963); United States v. Anthony Grace & Sons, Inc., 384 U.S. 424 (1966); Crown Coat Front Co. v. United States, 386 U.S. 503 (1967).

[28] *See* ASPR, Appendix A, Part 2—Rules 4, 6-10, 13-15, 20-24 (1974); *Procurement Commission, supra* n.12, Vol. 4 at 17; Spector, *supra* note 12 at 6-7; Spector, *Public Contract Claims Procedures—A Perspective*, 30 Fed. Bar J. 1, 8 n.43 (1971); Frenzen, *supra* n.8 at 58-60.

Most of the boards of contract appeals have optional accelerated procedures that allow a single board member to decide cases and encourage waiver of discovery, pleading and briefs. See, e.g., Charter of the ASBCA, Rule 12; AEC procedure in 10 C.F.R. §3.205. These procedures were first instituted in 1958 coincidentally with the Hebert subcommit¼ tomary for the Goernment to be represented by a lawyer before the boards and a near necessity for contractors to be similarly represented. Therefore, when a complex contract dispute involving large amounts of money is litigated, it is not surprising that two to three years may ensue between filing of an appeal and decision.[29]

Although both the contractor and the Government deserve a complete examination of any claim, conducted with certain procedural guarantees, boards of contract appeals were not necessarily intended to be the bodies that conduct such reviews. Providing such reviews can be and often is contrary to the original goals of speed, flexibility and inexpensiveness. The boards have been placed in a position of having little choice but to formalize their procedures if they are to provide full fairness to the parties, who will not receive a second chance to present their cases in full.

In recent years Government agencies have adopted contracting procedures that seek to maximize competition, shift economic risks to the contractor and provide cost discipline.[30] At the same time, many contractors have been very anxious to continue obtaining Government business during otherwise slack times and therefore have made unwisely low bids. On long-term contracts, unanticipated inflation has often made contract prices inadequate to cover costs.[31] The contracting environment has thus created great incentives for contractors to seek price adjustments through the disputes clause. In most cases, Government actions or inactions during the life of a contract have provided a measure of validity for contractor allegations by

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tee of the House Armed Services Committee's inquiry into slowness of the disputes settlement procedures. Shedd, *supra* n.8 at 58-60. Availability of these accelerated procedures, however, has now always made possible expeditious settlements, because (1) they are available only for claims under $20,000 (AEC) or $25,000 (ASBCA); (2) they are rarely used (in only seven percent of pending appeals, although fifty-one percent of appeals were eligible, according to a study by the *Procurement Commission, supra* n.12, Vol. 4 at 18); and (3) they are minimally faster in some agencies, such as the AEC, as stated by Gantt & Burg, *supra* n.25 at 174. (The AEC handles almost all its appeals expeditiously at present. See n.29 *infra*.)

[29] Some recent complex cases that have required long periods from appeal filing to decision include United States v. General Dynamics, ASBCA #13,885 (1973) (four years) and United States v. National Manufacturing, ASBCA #15816, 74-1 BCA #19580 (1974) (three years). In the early 1970's, forty-three percent of all board cases took more than one year to resolve, fifteen percent took more than two years. *Procurement Commission, supra* n.12, Vol. 4 at 18.

The description in the text of the procedures of boards of contract appeals does not necessarily fit all such boards. Gantt and Burg, *supra* n.25, describe a much more flexible board at the Atomic Energy Commission. The AEC board is unique in using both non-lawyers and non-Government employees on its boards. *Id.* at 179. For each case, a determination is made of the best qualified persons to handle the matter at issue. *Id.* at 183. The panels act in a very flexible manner to encourage both parties to clarify the issues and present the relevant evidence, and, if possible, reach compromise settlements. *Id.* at 183-86. The board has made special efforts to expedite appeals of small businesses, to give legal assistance to such contractors who are sometimes not represented by counsel, and to hold hearings wherever it would be most convenient. *Id.* at 190-91. The AEC board, however, normally disposes of less than twenty appeals per year, *id.* at 174; and Gantt and Burg, who have both worked for the board, admit, "The AECBCA could not do many things it does were it subjected to a large number of appeals." *Id.* at 200. The proposal made in this article for use of private arbitration would attempt to make the advantages of the AEC flexibility more generally available.

[30] See vom Baur, *Constructive Change Orders and the Current Claims Climate*, an address before the National Contract Management Assoc., June 20 and 21, 1972; *Seapower Hearings, supra* n.2 at 656-57 . . . (statement of the Shipbuilder's Council); at 1480 . . . (statement of William Middendorf, Sept. 26, 1974); at . . . . (testimony of John T. Gilbride, President, Todd Shipyards, Aug. 8, 1974); at 1501-502 (testimony of Adm. James Holloway, Chief of Naval Operations, Sept. 26, 1974).

[31] *Seapower Hearings, supra* n.2 at 1471-75 (testimony of William Middendorf, Sept. 26, 1974); at 1503 (testimony of Admiral James Holloway, Sept. 26, 1974).

establishing a basis for claims of constructive changes.[32] Sorting out legal liability and related damage calculations is thus often a quite difficult task. The established procedures have shown themselves often incapable of effectively resolving such disputes in the expeditious manner intended for a number of reasons:

1. Strong and generally well-founded Congressional and public pressures have been exerted on Government agencies to be hard-nosed in dealing with contractors to avoid waste of limited Government funds.[33] In reaction to the pressures, Government agencies have shied away from making any contract settlements other than those which can be fully, comprehensively and accurately justified.

2. Consistent with normal operating procedures in any large bureaucracy, procurement officials in the Government have been unwilling to stake their reputations on approval of any settlements that are other than beyond question. The Government negotiators lack an ability to compromise in the best interest not only of the immediate contract, but also of long-term good working relationships between Government and contractor.[34] The environment has rewarded inaction rather than action at the contracting officer level.[35]

3. The established bodies for making final determination of disputes within agencies, boards of contract appeals, have been placed in the position of being the final fact finders. As such, they have felt a need for trial-type due process as a means of guaranteeing fairness.[36]

The motivations of the principal players in the procurement dispute settlement process are admirable. On one hand, the Government must be ever-vigilant in its contracting procedures; and, on the other, contractors deserve fair hearing of their complaints. The net result, however, has been an agonizingly slow dispute settlement process that in the end often benefits neither the Government nor contractors. The poor results that were to be avoided through a flexible dispute process have come to fruition. Contractors have become exasperated with the inability of contracting officers or boards of contract appeals to reach decisions. Good working relationships have been sacrificed in the interest of legally precise determinations of liability.

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[32] A constructive change is defined in Navy Procurement Circular No. 31 (March 21, 1973) as a "change based on Government conduct, including actions or inactions, which is not a formal written change order but which has the effect of requiring the contractor to perform work different from or in addition to that prescribed by the original terms of the contract." The boards of contract appeals have over the past fifteen years greatly expanded the types of Government action or inaction that they term constructive change orders. Such orders have been considered to involve disputes under the contract, which the boards can resolve, as opposed to breaches of the contract, which must be presented to the courts for resolution. Sachter, *supra* n.17 at 365-71; *Procurement Commission, supra* n.12, Vol. 4 at 15-16. For a description of the broad variety of actions or inactions that have been deemed constructive change orders, see vom Baur, *Constructive Change Orders/Edition III*, Government Contractor Briefing Papers (1973). The profusion of such problems in shipbuilding is discussed in *Seapower Hearings, supra* n.2 at 952-53 (testimony of Edwin M. Hood, July 26, 1974); at 1485-86 (testimony of William Middendorf, Sept. 26, 1974); at 933-35 (testimony of John Diesel, President, Newport News Shipbuilding, Aug. 6, 1974).

[33] See, e.g., *Hearings before the Subcomm. on Priorities and Economy in Government Joint Economic Comm.*, 92d Cong., 2d Sess., "The Acquisition of Weapon Systems" (1972-73).

[34] *Seapower Hearings, supra* n.2 at 1118-27 (testimony of F. Trowbridge vom Baur, Sept. 16, 1974); at 1012 (testimony of Fred O'Green, Aug. 13, 1974).

[35] See n.24, 28 *supra*.

[36] *Procurement Commission, supra* n.12, Vol. 4 at 12.

Failures to maintain good working relationships have led private contractors to refuse to do Government work and the result has been decreased competition and higher prices to the Government.[37] The suggestion made here for use of private arbitration, although unable in itself to solve the problems that cause disputes, does offer an opportunity to ease the settlement procedure problems enumerated above.

Arbitration

Use of arbitration to settle disputes has expanded tremendously since the nineteenth century days when courts disapproved of the procedure because it removed cases from their jurisdiction. Private arbitrators are widely used in commercial transactions, labor-management relations[38] and insurance policy claims. The Supreme Court has consistently praised arbitration for its role in resolving labor-management disputes.[39] Even the interests of governments, state, local and Federal, are ruled upon by private arbitrators. Public employees are now represented by unions and have their grievances submitted to private arbitrators;[40] state and local governments have for many years submitted contract disputes to private arbitrators;[41] arbitrators' decisions on back pay for Government employees are now enforceable;[42] and the NLRB is developing a principle of deferral to private arbitrators in cases where they determined statutory, as well as contractual, claims.[43] Resolution of federal Government contract disputes is one of the few areas where private arbitration has yet to be used.[44]

The rationale for not using private arbitration in Government contract disputes does not appear substantive. Arbitration has proven in the commercial setting to have its promised advantages over more judicial procedures. There are typically few procedural rules which bind arbitrators. Although they have the authority to summon witnesses or require submission of books, records or documents, there is no rigid formula for how proceedings are to be conducted. Rules of evidence are not deemed necessary to prevent prejudicial presentation of evidence. Affidavits are often used to simplify the presentation of evidence.

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[37] *Id.*, Vol. 4, at 3; see also n.7 *supra.*

[38] By 1971, approximately ninety-four percent of labor agreements contained arbitration clauses. BNA, *Basic Patterns in Union Contracts* 51:6 (7th Ed. 1971).

[39] Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235, 252 (1970); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

[40] *See* 5 U.S.C. §7301, Exec. Order 11491 (1969), 39 U.S.C. §1207 (1970).

[41] District of Columbia v. Bailey, 171 U.S. 161 (1898); County of Middlesex v. Gevyn Construction Corp., 450 F.2d 53 (1st Cir. 1971); Cary v. Long, 181 Cal. 443, 184 P. 857 (1919); Campbell v. City of New York, 244 N.Y. 317, 155 N.E. 628 (1927); see also cases collected in 40 A.L.R. 1370. Authority to arbitrate has in many municipal cases been implied without need for a statute. City of Shawneetown v. Baker, 85 Ill. 563 (1877); Smith v. Borough of Wilkinsburg, 172 Pa. St. 121, 33 A. 371 (1895).

[42] Washington *Post*, Nov. 4, 1974 at B13.

[43] See Isaacson and Zifchak, *Agency Deferral to Private Arbitration of Employment Disputes*, 73 COLUM. L. REV. 1383 (1973).

[44] The Defense Department, however, does allow prime contractors to settle disputes with their subcontractors by arbitration. ASPR 23-203 (1974); *see Federal Contracts Reports* No. 550, "Subcontract Disputes: The Case of the Missing Remedy?" (1974); M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION, 96-97 (1968). Great Britain has authorized arbitration of government contracts since 1925. Greske, *supra* n.14, 29 A.B.A.J. at 16.

Arbitrators are free to seek all evidence which will be helpful in deciding the dispute and then to determine the relevancy of what they receive. They can call on the parties for assistance in researching the law. Hearings can be scheduled at the convenience of the parties since no court calendar imposes constraints. Arbitrators perform the central role in guiding the parties to present the background needed to resolve the dispute. They are well-suited for this task as the third party outsiders chosen specifically for this purpose by voluntary consent of the two parties. Generally, arbitrators will be experts in the area of the dispute, able to use their prior knowledge to cut quickly to its heart.[45] Associated with the advantage of flexibility is the possibility for greater speed and less cost. The flexible, informal process allows rapid dissemination of evidence among the parties.

Parties who have voluntarily agreed to submit a dispute to a private arbitrator normally do so in order to achieve a fast, equitable resolution. When the process works as intended, it minimizes ill will between the parties. The arbitration process, rather than stressing adversary relationships, as do current intra-agency dispute procedures, seeks to promote cooperation in setting forth evidence and law needed to resolve a dispute.

These advantages, which have led to widespread use of private arbitration in other contexts, would also be advantageous in Government contract disputes. The Government and contractors are interested in speedy, equitable, final decisions. It is in both parties' interests not to expend large resources settling old differences and to avoid long periods of antagonistic contact. The similarity of the advantages offered by private arbitration to the goals established for the internal agency dispute settlement procedures should not be surprising. Internal dispute procedures were intended to be, and have often been characterized as, a form of arbitration.[46] The internal procedures, however, as we have seen, have often failed to provide the advantages because of a combination of bureaucratic self-interest and judicial requirements.

Arbitration could provide a fair yet expeditious alternative process for settling such claims. Disagreements could be submitted to local arbitrators at the site of the contractor, thus reliving contractors of any need to haggle endlessly with interested contracting officers who are restricted by bureaucratic and political constraints or to deal with judicialized boards in Washington that have lost their flexibility over the years.[47] On the other side of the procedural coin, some contractors are reluctant to submit disputes to boards of contract appeals because they feel even the boards lack certain elements of due process.[48] Although arbitration proceedings lack in a formal sense some of the same due process guarantees, contractors might be more willing to present their cases in such forums because the deciders would be impartial outsiders rather than employees of the opposing Government agency.[49] Arbitration is certainly not a panacea in cases where contractors desire more due process, but it is an alternative that in some cases might be desirable to both Government and contractor.

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[45] F. and E. Elkouri, How Arbitration Works (1973); Domke, *supra* n.44, §§20-25, 28-30.

[46] See, e.g., Anderson, *supra* n.14 at 217; Joy, *Disputes Clause in Government Contracts*, 25 Ford L. Rev. 11 (1956); United States v. Wunderlich, 342 U.S. 98, 100 (1951).

[47] Travel time and expenses are a major deterrent to appealing small claims. *Procurement Commission, supra* n.12, Vol. 4 at 17.

[48] Boards of contract appeals, for instance, have no subpoena powers (except for the AEC) and limited discovery tools. *Id.*, Vol. 4 at 21, 27-8.

Submission of Government contract disputes to private arbitrators would therefore seem to offer, in many instances, a desirable alternative to the normal contracting officer or board of contract appeals method of resolution.[50] A number of legal and practical problems with the use of arbitration, however, first deserve examination. Government procurement officials have been reluctant to agree to such procedures because of a long line of Comptroller General decisions that have held that the United States cannot submit to contract arbitration without explicit statutory authority. The weakness of the legal argument against Government arbitration in the Comptroller General decisions, as will be discussed next, indicates that change in General Accounting Office policy is warranted. Beyond this basic question lie possible problems with (a) the ability of courts to order the Government to arbitrate, (b) the standard of review that would be used by courts in appeals from decisions of private arbitrators, and (c) loss of uniformity of decision once Government contract appeals are resolved by arbitrators.

Is Arbitration By The Government Legal?

Unconstitutional Vesting of Judicial Power

Much of the concern about the legality of arbitration by the Federal Government can be traced to one very old Federal Circuit Court decision. The court held in *United States v. Ames*[51] that the Secretary of War exceeded his authority when he authorized a United States Attorney to agree to arbitrate a dispute concerning damage to Government land. The court apparently based its decision on constitutional grounds, reasoning that no government official can create judicial power anywhere except in a court established under Article III:

> All judicial power is by the constitution vested in the supreme court, and such inferior courts as congress may, from time to time, ordain and establish. Const. U.S. art. 3, sec. 1. No department nor officer has a right to vest any of it elsewhere; and it has been questioned even if congress can vest it in any tribunals not organized by itself (citations omitted).[52]

Since the proposition that the Constitution prohibits exercise of judicial power by any body other than Article III courts has been discredited since *Ames*,[53] its holding seems to have no validity today. If *Ames* were still good law, its apparent constitutional holding would prevent even Congress through specific statutory authorization from permitting Government officers to agree to arbitrate. Since legislation has purported to authorize arbitration by the Government in certain specific instances,[54] it seems that Congress did not feel the apparent constitutional rule of *Ames* was sound.

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[49] As the *Procurement Commission, supra* n.12, Vol. 4 at 3, pointed out, "the board members are appointed by the agencies and must depend on them for career advancement;" *contra*, Gantt & Burg, *supra* n.25 at 180.

[50] Use of flexible alternative disputes settlement procedures is consistent with the general philosophy of the *Procurement Commission, supra* n.12, Vol. 4 at 19-20.

[51] United States v. Ames, 24 F. Cas. 784 (No. 14,441) (C.C.D. Mass. 1845).

[52] *Id.* at 789.

[53] E.g., Reconstruction Finance Corp. v. Bankers Trust Co., 318 U.S. 163 (1943); Sunshine Anthracite Coal Co., v. Adkins, 310 U.S. 381 (1940).

Instead of being used as a bar to arbitration by the Government today, *Ames* should more properly be viewed as an example of the general nineteenth century judicial attitude disfavoring arbitration, even by private parties. Indeed, a somewhat later nineteenth century Supreme Court decision, *United States v. Farragut,*[55] upheld arbitration by the Federal Government where the lower court had agreed to refer a pending suit to arbitrators whose decision would become the judgment of the court. Although the issue of the authority of the Government to submit to arbitration was not discussed in detail in *Farragut,* its holding that the arbitration was valid seems rather authoritative not only on the constitutional issue, but also on the issue of whether arbitration requires specific statutory authority.

Specific Statutory Authority

Although the Constitutional objection to Government arbitration of contract disputes is rather clearly no longer sound, there remains the question of whether specific statutory authorization is necessary. The lack of statutory authority has been one of the arguments relied on by the Comptroller General during this century to hold arbitration illegal.[56] It is well established that the head of an executive department has, incident to his authority to run his department, the authority to handle contract disputes.[57] This authority extends to the settlement of contract disputes by compromise or through the normal dispute process. In the absence of any statute prohibiting arbitration by the Government, this authority of the agency head to handle and settle contract disputes certainly should obviate the need for specific legislation permitting arbitration.

The Comptroller General has argued that the existence of three statutes explicitly authorizing the Government to arbitrate in certain specialized cases makes clear a general requirement for such legislation.[58] Such an argument is overstated with respect to the Suits in Admiralty Act and the Public Vessels Act. Both statutes authorize certain high Government officials to "arbitrate, compromise, or settle" certain claims arising in admiralty. The Government officials named had not previously had the authority to compromise or settle such specified claims, nor to submit them to arbitration. Therefore, in authorizing the officials to handle these claims, it was only natural for Congress to include the authority to arbitrate. By contrast, the authority of the head of an executive department to handle and settle contract disputes is not based on any particular statute, but rather on well established practice and judicial expression.[59] There has been no occasion so convenient for Congress to include a specific authorization of arbitration for general contract disputes. The specific inclusion of arbitration authority in the admiralty claim statutes cannot be viewed as an implicit determination that specific authority is required in the case of normal contract disputes.

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[54] Statutes cited n. 58 *infra.*

[55] 89 U.S. (22 Wall) 406 (1874).

[56] See, e.g., 32 Comp. Gen. 333 (1953); 19 Comp. Gen. 700 (1940).

[57] See n.15 *supra.*

[58] 32 Comp. Gen. 333, 335 (1953). The statutes are: Suits in Admiralty Act, 46 U.S.C. §749 (1970); Public Vessels Act, 46 U.S.C. §786 (1970); Contract Settlement Act of 1944, 41 U.S.C. §113(e) (1970). Also, the Foreign Assistance Act of 1961 contains a provision permitting arbitration of claims against the Agency for International Development arising out of the foreign investment guaranty program. 22 U.S.C. §2395(i) (1970).

The third statute authorizing arbitration, the Contract Settlement Act of 1944,[60] deals with cases of a type which the military departments already had general authority to settle. However, the legislative history of this Act indicates that Congress never considered whether or not such a specific statutory authorization was required to allow arbitration.[61] The only mention of the arbitration provisions in the legislative history is in letters from the American Arbitration Association supporting the use of arbitration[62] and the Attorney General opposing it.[63] Neither letter dealt with the issue of whether specific statutory authorization would be required. The AAA proposed that the Act make arbitration available at the option of the contractor in all cases. Since it is clear that legislation would be required to *force* a Government agency to give contractors an option of arbitrating, the AAA's proposal cannot be taken as an indication that legislation is necessary merely to *allow* a Government agency to arbitrate. Although the Act, as passed, merely gave the Government agencies the option of allowing the contractor to arbitrate, this difference from the original AAA proposal is probably due to the uncertainties and compromise inherent in the legislative process. There is no indication in the legislative history that Congress felt this Act was required to legitimate arbitration.

In summary, none of the three statutes specifically authorizing arbitration by the Government should be taken as an expression of congressional intent that specific statutory authorization is necessary before Government officials, who clearly possess the authority to settle contract disputes, may submit such disputes to arbitration.

Statutes

Three other Federal statutes have been relied upon by the Comptroller General to deny the validity of arbitration by the Government. Title 31, Section 672, prohibits payment of expenses connected with any commission or inquiry, other than courts martial or military courts of inquiry, unless special appropriations have been made. Title 31, Section 673, prevents public funds from being used to pay expenses of "any commission, council, board, or other similar body" unless the body "shall have been authorized by law."

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[59] See n. 15 *supra*.

[60] See n.58 *supra*.

[61] *Hearings on S. 1268, S. 1280, and S.J. Res. 80 Before Subcomm. of the Senate Comm. on Military Affairs*, 78th Cong., 1st Sess. (1944) [hereinafter cited as *1944 Hearings*].

[62] *1944 Hearings*, pt. 6 at 435-443.

[63] *Id.* at 522-29.

For a time these statutes were invoked by the Comptroller General to disallow payments for the expenses of arbitration.[64] Such an interpretation of these late 18th and early 19th century statutes is inconsistent with modern practice. So interpreted, the statutes would prevent the payment of expenses of boards of contract appeal or most special advisory bodies, which are commonly used in the executive branch although seldom officially authorized by Congress. Fortunately, the Comptroller General has retreated from so expansive an interpretation. He has taken the position that it is sufficient for boards or commissions to be authorized implicitly by general statutes authorizing executive agencies to carry out their activities.[65]

The third statute that the Comptroller General still appears to rely on to disfavor arbitration is the Budget and Accounting Act.[66] The Act provides that "all claims and demands whatever by the Government of the United States or against it . . . shall be settled and adjusted in the General Accounting Office."[67] The Comptroller General has argued that arbitration of a claim against the Government effectively ousts the GAO of its statutory jurisdiction to settle claims. Although strangely similar to the now discredited doctrine that arbitration is unconstitutional because it ousts Article III courts of their jurisdiction, the Comptroller General has never disavowed this position. This argument would also apparently prohibit the practice of allowing contractor claims to be decided by agency boards of contract appeals whose decisions are not, short of fraud, subject to GAO challenge in the courts.

Although the role of the GAO as a reviewer of agency contract settlements was at one time clouded,[68] the Supreme Court made it explicit in *S&E Contractors*:

> Since the AEC withheld payment solely because of the views of the Comptroller General and since he had been given no authority to function as another tier of administrative review, there was no valid reason for the AEC not to settle with petitioner according to its earlier decision.[69]

Although his lengthy dissent disagreed on other grounds, Justice Brennan carefully reviewed the legislative history of the Wunderlich Act and found "GAO's attempt to obtain the power of binding review over disputes decisions was [a] failure."[70] The clear denial of GAO review authority renders this final objection of the Comptroller General insubstantial.

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[64] 5 Comp. Gen. 417 (1925).

[65] 40 Comp. Gen. 478 (1961); 22 Comp. Gen. 140, 143 (1942).

[66] 31 U.S.C. §§41-56, 71 (1970); 8 Comp. Gen. 96, 97 (1928).

[67] 31 U.S.C. §71 (1970).

[68] See Braucher, *supra* n.14 at 478, 489.

[69] S. & E. Contractors v. United States, *supra* n.1 at 10.

[70] *Id.* at 55. The separate question of the judicial scope of review over decisions by private arbitrators in Government contract cases will be discussed *infra* notes 78-88. The argument in the text here is that the broad Budget and Accounting Act language should not be construed to prohibit private arbitrators, rather than the GAO, from deciding contract disputes, and not necessarily that the *S&E* holding that the GAO cannot in any way challenge a board of contract appeals decision would also apply to decisions of private arbitrators.

Precedent Supporting Arbitration

Not only is there an absence of persuasive authority for the proposition that arbitration by the Government is illegal, but there also exists substantial modern authority for the opposite conclusion. In *George J. Grant Construction Company v. United States,*[71] the Court of Claims held that a contractor could not seek judicial relief against the Government in a contract dispute when it had failed to pursue the arbitration remedy specified in the contract. The Court analogized arbitration to the normal contracting officer and board of contract appeals disputes procedure and rejected the argument that the arbitration provision was illegal. Speaking of the standard "disputes" article, the Court wrote:

> That article provides that, in case of dispute, the decision should be made by the contracting officer, subject to the contractor's right to appeal to the head of the department, whose decision should be final. That is a sort of arbitration, albeit by agents of one party to the contract. Yet, it violates as completely as arbitration by third persons, as provided for in the instant contract, would violate, any doctrine that Congress has consented to have decisions made against the Government only in the Court of Claims.[72]

Another argument in support of the legality of arbitration may be derived from a series of Comptroller General decisions. They have held that although the Government may not submit the issue of "liability" or the existence of a "legal right" to private arbitrators, they may be allowed under a contract clause to "appraise" the amount of money owed to or by the Government, provided the legal obligation is derived from another portion of the contract.[73] There is little basis in policy or logic for a distinction between "appraisal" and "arbitration" in a consideration of the arguments discussed above as to the necessity for specific statutory authorization. Indeed, the "jurisdiction" of the General Accounting Office (or of the Courts) seems to be no less encroached upon by allowing private arbitrators to determine the extent of liability than by allowing the same arbitrators to determine the existence of the liability. The Comptroller General's admission that "appraisal" is proper should cause his arguments against the legality of "arbitration" to be taken less seriously.

Thus, the only remotely recent court decision on this issue supports the legality of arbitration; and even some decisions of the Comptroller General can be used to argue for this position. Although scholarly comment on this issue is both sparse and somewhat dated, it unanimously agrees on the legality of arbitration by the Government.[74]

HOW WOULD ARBITRATION WORK?

Even if specific statutory authority is not required before the Government may agree to arbitrate, certain legal uncertainties and troublesome policy considerations nevertheless surround the use of arbitration.

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[71] 109 F. Supp. 245 (Ct. Cl. 1953).

[72] *Id.* at 247.

[73] 22 Comp. Gen. 140, 145 (1942); 20 Comp. Gen. 95, 99 (1940).

[74] Braucher, *supra* n.14; MIAMI L.Q., *supra* n.14.

Orders to Arbitrate

Agreements between the Government and contractors to arbitrate could be made either at the time a dispute arises or prospectively in the original agreement as part of the disputes clause. If agreement to arbitrate exists at the time of the dispute, no legal impediments to such a resolution will arise; but, should the Government balk, despite a contract clause calling for arbitration, questions of judicial authority to order arbitration become relevant. The Federal Arbitration Act[75] would apparently make an agreement by the Government to submit to arbitration valid except for reasons which would render any contract unenforceable. Most any federal procurement contract would be "a contract evidencing a transaction involving commerce,"[76] as "commerce" is defined in the Act.[77] However, the provisions of the Act providing for the issuance of court orders to compel arbitration do not seem to fit well in cases of Government contract disputes. Section 4 of the Act provides:

> A party aggrieved by the alleged failure, neglect, refusal of another to arbitrate under a written agreement for arbitration may petition *any United States district court* which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.[78] (Emphasis added.)

In Government contract disputes in which the amount in controversy exceeds $10,000, jurisdiction is vested by the Tucker Act exclusively in the Court of Claims.[79] Thus, the Federal Arbitration Act does not itself grant, in cases involving more than $10,000, any court the right to issue an injunction compelling the Government to arbitrate. However, a plausible argument can be made that the Court of Claims has the power, under the All Writs Act,[80] to issue orders enforcing an arbitration agreement which has been rendered substantively valid by the Federal Arbitration Act. If the Court of Claims did not issue an order compelling the Government to arbitrate, the contractor would be left to pursue his remedy via the contracting officer and board of contract appeals. At that point, if the case eventually came before the Court, it would be in a significantly different posture than the Federal Arbitration Act would seem to require when it declares the arbitration clause to be valid in a substantive sense. The All Writs Act would seem to be the appropriate authority for the Court of Claims to prevent such interference with its jurisdiction by ordering arbitration. Furthermore, since such an order would run against an executive agency, it would be in the nature of a writ of mandamus, which is clearly authorized in appropriate cases by the All Writs Act.[81]

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[75] 9 U.S.C. §1 *et seq.* (1970).

[76] The Act provides in pertinent part: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, invocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2 (1970).

[77] "Commerce" is defined as: " . . . commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . . ." 9 U.S.C. §1 (1970). Thus, practically any Federal procurement contract would constitute a "contract evidencing a transaction involving commerce."

[78] 9 U.S.C. §4 (1970).

[79] 28 U.S.C. §§1346(a)(2), 1491 (1970).

[80] 28 U.S.C. §1651 (1970). Section 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

In the only instance in which the Court of Claims has dealt with this issue (albeit in a *dictum*), it indicated a clear belief that the Government could not be compelled to fulfill a contractual commitment to arbitrate. In *Aktiebolaget Bofors v. United States*[82] the court dismissed an argument of a contractor on the ground that the Government could not be compelled to arbitrate. He had contended that the refusal of the Government to arbitrate pursuant to a contractual provision gave rise to a cause of action which would start the applicable statute of limitations, which had already run on the underlying contractual cause of action, running again. The Court did not reach the issue of the validity of the arbitration clause, but assumed arguendo its validity:

> In the absence of special circumstances such as that one has been misled, to his damage, by the repudiation of an agreement to arbitrate, the only effective judicial remedy for such a refusal is a decree for specific performance. That remedy is not available against the United States since it has not consented to such suits.[83]

The court in *Bofors* seemed to feel that the difficulty in compelling the Government to arbitrate arose not from the lack of a statute giving the Court of Claims the explicit authority to issue orders compelling arbitration, but rather from the fact that the Government had not "consented" to be a defendant in an action to compel arbitration. This sovereign immunity argument ignores the common sense interpretation that by entering into a contract containing an arbitration provision, the Government effectively consents to be sued, not merely on an action to enforce an arbitral award, but also on an action to compel arbitration. This argument has been accepted by state courts in rejecting the contention of state governments that they could not be compelled to arbitrate pursuant to contractual provision,[84] but the paucity of arbitration decisions in Federal Government cases leaves some doubt about the enforceability of Federal agreements to arbitrate.

Standard of Review

What would happen should one of the contracting parties be unhappy with an arbitral decision? Presumably, the dissatisfied party would seek judicial relief from the decision in a federal court.[85] In this situation, it is unclear what standard of review the court should apply. The standard most likely to result in the affirmance of the arbitral award is that provided by the Federal Arbitration Act.[86] If this statute is deemed applicable to arbitration by the Government,[87] the award could be vacated only on one of several very narrow grounds, including fraud, partiality, or misconduct or actions beyond the authority of the arbitrator.[88] Should this standard be deemed applicable, the award of arbitrators would be much more difficult to upset than a decision by an agency board of contract appeals. Under the Wunderlich Act,[89] such decisions may be reversed if they involve findings of fact not supported by substantial evidence or erroneous interpretations of law.[90] As previously discussed, the Federal Arbitration Act would seem, by its terms, to apply to arbitration by the Government of disputes arising under a contract involving "commerce;" however, the Act's provisions for enforcement of an agreement to arbitrate do not appear to contemplate the Government as a party.

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[81] See Territo v. United States 170 F. Supp. 855 (D. N.J. 1959) (dictum), *appeal dismissed*, 358 U.S. 279, *motion to reinstate denied*, 359 U.S. 963; *Eng. v. Acheson*, 108 F. Supp. 682 (D.N.Y. 1952) (dictum). But *cf Borak v. Biddle* 141 F.2f 278 (D.C. Cir. 1944), *cert. denied*, 323 U.S. 738.

[82] 153 F. Supp. 397 (Ct. Cl. 1957).

[83] *Id.* at 399.

[84] Watkins v. Department of Highways of the Commonwealth of Kentucky, 290 S.W.2d 28 (Ky. App. 1956); *cf.* Dormitory Auth. of State of New York v. Span Electric Corp., 18 N.Y.2d 114, 271 N.Y.S.2d 983, 218 N.E.2d 693 (1966).

[85] If the Government is unsatisfied with an arbitral award, it is unclear whether it would be allowed to appeal. S & E Contractors v. United States, *supra* n.1. held that the Government could not appeal a decision of a board of contract appeals. The lack of clarity in the rationale for Justice Douglas' majority opinion makes it difficult to apply *S & E's* reasoning to arbitral awards. However, the opinion relied on the words of the existing dispute clause, *id.* at 9, and on the unfairness of the procuring agency's final opinion being challenged by another Government agency, *id.* at 13-14. Given an amended disputes clause allowing less than "final and conclusive" arbitration and a decision, not by the agency, but by independent arbitrators, the Court might look more favorably upon Government appeals.

The Wunderlich Act is itself arguably applicable to an arbitral decision involving the Government. However, as in the case of the Arbitration Act, it seems unlikely that this issue was considered by the drafters. The section of the Act dealing with review of findings of fact applies to "any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract."[91] The question faced here is whether the words "his duly authorized representative or board" would be interpreted to include a panel of arbitrators, one or more of whom may have been chosen by the agency. The second part of the Wunderlich Act, dealing with questions of law, applies to the "decision of any administrative official, representative or board."[92] Again, the question arises whether the drafters intended the reference to "administrative . . . representative or board" to apply only to Government-employed personnel, or, more generally, to any panel.

A third standard of review is also possible, namely that the court would find neither the Federal Arbitration nor Wunderlich acts applicable and grant a *de novo* review of an arbitral award. Arbitration would clearly be intended as an expeditious substitute for judicial determination of a dispute, and, in the absence of Congressional direction of how to view such procedures, the courts might determine that it is the Government's duty to contractors to make available at some point full due process guarantees. Such procedures could be provided by *de novo* review either in the court or through remand to a board of contract appeals.

Much of the unpredictability of judicial standards of review might be cleared up in the Government/contractor agreement to arbitrate. Relying on the basic contract principle that parties, including the Government, can agree to be bound by the decision of a designated person, the Government and contractor could specify the degree of finality to be given the arbitral award.[93] If a court did not find such an agreement contrary to either the Federal Arbitration or Wunderlich acts, it would review the arbitral decision in light of the guidance in the parties' agreement. Without any past experience in judicial review of arbitrated Government claims, however, the finality issue remains an impediment to both Government and contractor willingness to use such procedures.

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[86] See n.75 *supra*.

[87] See notes 68-77 *supra*.

[88] 9 U.S.C. §10 (1970).

[89] 41 U.S.C. §§321-22 (1970).

[90] The Wunderlich Act has been construed to prevent the Court of Claims from engaging in a *de novo* review of findings of fact by agency boards of contract appeals, at least where such boards provide trial-type procedures. United States v. Bianchi & Co., *supra* n.27.

[91] 41 U.S.C. §321 (1970).

[92] 41 U.S.C. §322 (1970).

Loss of Uniformity

One possible disadvantage of using arbitrators might be a loss of uniformity in Government procurement decisions. The boards of contract appeals, especially the ASBCA, have over the years been able to elucidate many areas of procurement law and establish recognized precedents. That uniformity might be lost if arbitrators, who either wrote limited opinions or no opinions at all, decided many disputes.

This disadvantage is somewhat lessened by the predominance of factual, rather than legal, questions in Government contract disputes. The Commission on Government Procurement found that disputes brought before the boards were essentially factual, with most involving specifications, contract changes, or default terminations.[94] Such factual disputes require little exposition of overriding principles of law. Rather, understanding of the particular procurement and commercial practices involved must be applied to sort out the facts. It is such expertise that specially selected arbitrators can be particularly useful in providing.[95]

In some basically factual disputes between Government and contractors, it may be desirable to have arbitrators who need not justify their decisions in written opinions. As the Navy cases demonstrate, claims based on large value, long-running contracts can involve complex factual determinations and immense volumes of data and records. In such cases, the basic facts that establish the extent of validity of the claim may be clear, but precisely substantiating each portion of the claim in light of the mass of records may require inordinate effort and have minimal precedential value. As one commentator has said of the disputes involved in many Government contract cases:

> [T]here may be a legitimate need for a method of dispute settlement using a simple jury verdict or statement of award approach with covert premises that will not lead to confusing precedents but which perform justice in individual situations.[96]

Not all disputes would be well suited for such forms of resolution; some will involve important principles of law; others will depend on one crucial factual element whose interpretation, a mixed question of fact and law, will be a significant precedent. The current dispute procedures at the board of contract appeals level, however, are often unable to supply a flexible resolution procedure when it would be appropriate, because of the extent to which they have been judicialized.

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[93] WILLISTON, CONTRACTS, Vol. 3, §§794-803 (1936); CORBIN, CONTRACTS, Vol. 3A, §652 (1960); see also Shedd, *supra* n.8 at 43-44.

[94] *Procurement Commission, supra* n.12, Vol. 4 at 15.

[95] Frenzen, *supra* n.8 at 64-70, finds that private parties are most likely to make use of commercial arbitration when factual questions predominate and legal or policy questions are not essential to resolution of the dispute.

[96] *Id.* at 75, n.91, 75-77.

Conclusion: A Proposal

The time has arrived to give private arbitration an opportunity to prove itself as a desirable means of resolving Government contract disputes. Although great dissatisfaction has been expressed with existing dispute procedures, no real changes have been made in recent years. In 1972 the Commission on Government Procurement made serveral suggestions for improving disputes settlement: informal conferences at a level higher than the contracting officer to review decisions of contracting officers adverse to the contractor, regional small claims boards to resolve disputes involving $25,000 or less, and direct access to the courts for contractors not desiring to process their claims through the boards of contract appeals.[97] These suggestions were made to cure many of the same problems of inefficiency in the present system for which private arbitration has been advanced as a solution here. Each represents an attempt to add some flexibility to the existing dispute procedures, to expedite resolution and to reduce costs of litigation. Each solution has run into resistance from various parts of the executive branch, and none has been adopted.

No attempt has been made here to compare the merits of these suggestions with those of private arbitration. Any attempt to select the best overall dispute settlement procedures would entail detailed descriptions of the procurement process beyond the scope of this article. It is unlikely, however, that any one procedure would be best suited for all disputes. The apparent promise of private arbitration argues for Government experimentation. Such experimentation could provide empirical evidence on the efficacy of such procedures that would be useful in the future as the Government slowly reorganizes its dispute procedures.

The GAO should reverse its position on arbitration, and Government procurement agencies should encourage their contracting officers to suggest private arbitration to contractors. If the contracting officer and contractor are having difficulties that are hindering timely issuance of a contracting officer's decision, or if such a decision has been issued, but the contractor is unhappy about the prospect of processing his claim through a board of contract appeals, the two parties may find it advantageous to submit their dispute to private arbitrators.

Selection of disputes that would be amenable to arbitration would be made on a case-by-case basis. It would seem most likely that factual disputes best resolved by persons with expertise in the commercial practices at issue would be the types of disputes best suited for referral to private arbitrators. Standard procedures for commercial arbitration could be used. Three person panels would seem best suited for large, complicated claims, but one person panels might prove acceptable in smaller or simpler cases. Because there would be agreement at the time of the dispute that arbitration was desired, no problems with enforcement of prior agreements to arbitrate would arise.[98] Although the degree of finality that would attach to the arbitrator's decision would be questionable,[99] the parties could weigh that problem. Eventually, an aggrieved party in such an arbitration would proceed to the Court of Claims where the scope of review would have to be clarified. In the interim, as long as both parties remained satisfied with arbitral awards, no need would arise to resolve this legal issue.[100]

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[97] *Procurement Commission, supra* n.12, Vol. 4 at 1-4, 11-29. An optional non-final agency review, similar in purpose to the Commission's suggested informal review, was also proposed by Schultz, *Wunderlich Revisited: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 LAW & CONTEMP. PROB. 115, 130, 134 (1964). Another approach that would allow boards of contract appeals to regain their flexibility has been proposed by Spector, *supra* notes 12 and 28. He would rewrite the disputes clause to allow *de novo* judicial review. See also Sachter, *supra* n.17 at 378-79 for recommendations aimed at increasing the quasi-judicial nature of the boards.

No legislative changes in procurement laws would be necessary for agencies to begin experimenting with use of private arbitration. Nor would it seem necesury for adoption of revised contract disputes clauses in new contracts before arbitration could be given a trial. Contractors would agree with the Government to amend existing disputes clauses at the time it was decided to submit a dispute to arbitration.[101] Arbitration would be substituted for the dispute procedures outlined in existing contract clauses. Strong leadership, however, might be required in many agencies to encourage procurement officials to use private arbitration. Although arbitration was explicitly authorized for resolving World War II contract claims, it was rarely, if ever, used.[102] The long-standing opposition of the Comptroller General to private arbitration of contract claims has made procurement officials wary of this alternative.

If a sizeable number of contract disputes were resolved by arbitration, evidence would be accumulated on whether arbitration expedited settlements and provided fair resolution of disputes, and thus supplemented existing procedures that have on many occasions failed to fulfill those twin goals. Guidelines could be established to help Government procurement officials determine the disputes most likely to benefit from such resolution.

It is in the best interest of both the Government and its contractors that a quick and efficient remedy exist for resolving contract disputes. Arbitration has proven highly successful as a means of resolving disputes in other contexts. It is high time that antiquated rulings against use of arbitration in Government contract cases be discarded and this modern dispute settlement tool be employed.

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[98] See notes 68-77 *supra*.

[99] See notes 78-86 *supra*.

[100] An alternative to private arbitration that avoids some of the problems of enforceability and scope of review, and that might be especially useful for large, long-standing claims such as the Navy's, would be for the agency head to appoint a specially selected, distinguished panel as his "designated representatives" to resolve claims. This panel would substitute for either the contracting officer or board of contract appeals. It would have many of the same advantages as private arbitration, see notes 38-43; but, because it was set up as the agency head's designated representative, it should avoid the criticism leveled by the GAO at truly private arbitration.

[101] Revision of ASPR and Federal Procurement Regulation dispute clauses, n.17 *supra*, would probably be required to give contracting officers the authority to enter arbitration agreements.

[102] Braucher, *supra* n.14 at 485.

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Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?

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Kirby Behre*

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I. Introduction

Long a subject of scholarly analysis, the issue of whether federal entities can or should use binding arbitration to resolve disputes concerning federal government contracts deserves thorough review in light of the passage of the Contract Disputes Act of 1978 (the CDA).[1] That Act provides a unified system for resolving disputes involving federal acquisition contracts. This article will compare binding arbitration to the CDA dispute resolution system and determine if arbitration is a permissible and desirable substitute for the latter.

Before 1978, the general rule was that, absent specific statutory authority, government agencies could not be bound by agreements to arbitrate while government corporations could.[2] This is a striking departure from the general judicial climate of the last fifty years which has consistently favored the use of arbitration. Previous works have discussed the unique and arguably weak justifications for the federal prohibition.[3] Most observers have concluded that the barriers to the use of arbitration are surmountable.[4] Some have predicted a dramatic increase in the use of arbitration in the government contract setting as those barriers are whittled away.[5]

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[1] 41 U.S.C. §§ 601–613 (1982).

[2] *See* Cogan, *Are Government Bodies Bound by Arbitration Agreements?*, 22 ARB. J. 151, 152 (1967); Braucher, *Arbitration Under Government Contracts*, 17 LAW & CONTEMP. PROBS. 473, 485 (1952); Note, *Authority of Government Corporations to Submit Disputes to Arbitration*, 49 COLUM. L. REV. 97, 97–98 (1949); Note, *Arbitration and Government Contracts*, 50 YALE L.J. 458, 462 (1941); *see also infra* at 79–83.

[3] *See* Hardy & Cargill, *Resolving Government Contract Disputes: Why Not Arbitrate?*, 34 FED. B.J. 1, 8–10 (1975); Katzman, *Arbitration in Government Contracts: The Ghost At the Banquet*, 24 ARB. J. 133, 135–36 (1969); Comment, *Validity of Arbitration Provisions in Federal Procurement Contracts*, 9 MIAMI L.Q. 451, 454–56 (1951); Braucher, *supra* note 2, at 474–75; Note, *Authority of Government Corporations to Submit Disputes to Arbitration, supra* note 2, at 97–98; Note, *Arbitration and Government Contracts, supra* note 2, at 462–64.

[4] *See, e.g.*, Hardy & Cargill, *supra* note 3, at 8–14.

[5] *See, e.g.*, Note, *Authority of Government Corporations to Submit Disputes to Arbitration, supra* note 2, at 103.

Most have simply assumed that arbitration is preferable to judicial settlement.[6] Yet arbitration is still used only in isolated instances.

When Congress passed the CDA it redefined the line, perhaps unwittingly, between those governmental entities that could arbitrate and those that could not absent a specific statutory grant of power to do so. Because the CDA disputes process is mandatory, government corporations covered by the CDA[7] no longer have arbitration as an option, at least in the context of acquisition contracts.[8] The CDA not only narrowed the exception to the general prohibition on the use of arbitration, it also made it much less likely that a governmental entity falling within the general ban will be successful in surmounting the barriers to the use of binding arbitration.

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[6] *See supra* notes 2–4; *but see* Crowell, *Arbitrating Commercial Disputes: More Problems Than Promise*, 15 NAT'L CONT. MGMT. J. 1 (1981).

[7] The CDA applies by its terms to express or implied contracts "entered into by an executive agency. . . ." 41 U.S.C. § 602(a) (1982). The term "executive agency" includes "a wholly owned Government corporation as defined by section 9101(3) of title 31, . . ." 41 U.S.C. § 601(2) (1982). Section 9101(3) is part of the Government Corporation Control Act (hereinafter "the GCCA"), 31 U.S.C. §§ 9101–9109 (1982), and lists 13 corporations as wholly owned by the government. 31 U.S.C. § 9101(3)(A)–(M). These wholly owned corporations are: the Commodity Credit Corporation, the Export-Import Bank of the United States, the Federal Crop Insurance Corporation, Federal Prison Industries, Incorporated, the Federal Savings and Loan Insurance Corporation, the Government National Mortgage Association, the Overseas Private Investment Corporation, the Pennsylvania Avenue Development Corporation, the Pension Benefit Guaranty Corporation, the Rural Telephone Bank (until ownership conversion, when it becomes a mixed-ownership government corporation), the Saint Lawrence Seaway Development Corporation, the Secretary of Housing and Urban Development when carrying out duties and powers related to the Federal Housing Administration Fund, and the Tennessee Valley Authority. (The application of the CDA to the Tennessee Valley Authority is further limited by section 4(b) of the CDA. 41 U.S.C. § 602(b) (1982).) The GCCA lists 10 corporations as "mixed-ownership" government corporations. These are the National Railroad Passenger Corporation (Amtrak), the Central Bank for Cooperatives, the Federal Deposit Insurance Corporation, the Federal Home Loan Banks, the Federal Intermediate Credit Banks, the Federal Land Banks, the National Credit Union Administration Central Liquidity Facility, the Regional Banks for Cooperatives, the United States Railway Association and the Rural Telephone Bank (after ownership conversion). 31 U.S.C. § 9101(2)(A)–(J) (1982). All total, there are 47 government corporations. COMPTROLLER GENERAL'S REPORT TO CONGRESS, CONGRESS SHOULD CONSIDER REVISING BASIC CORPORATE CONTROL LAWS, (General Accounting Office Report No. PAD–83–3, April 6, 1983), Appendix 1. Of the 25 corporations not covered by the GCCA, 8 are categorized as predominantly federal by the GAO, 4 as mixed federal/private, and 13 as predominantly private. The eight predominantly federal corporations are the Corporation for Public Broadcasting, the Federal Financing Bank, the Legal Services Corporation, the National Homeownership Foundation, the Neighborhood Reinvestment Corporation, the New Community Development Corporation, the Solar Energy and Energy Conservation Bank, and the United States Synthetic Fuels Corporation. The Inter-American Foundation, although not specifically listed under the GCCA, is controlled by the GCCA because its enabling legislation so specifies. 22 U.S.C. § 290f(t) (1982). The four mixed federal/private corporations are the Consolidated Rail Corporation (Conrail), the Northeast Commuter Services Corporation, the Securities Investor Protection Corporation, and the U.S. Postal Service. The

This article discusses why arbitration is generally not available in the context of federal government contracts, and whether its limited availability is the significant restriction on agencies and government contractors in light of the new dispute resolution process embodied in the CDA. It examines the ability of federal entities to arbitrate absent specific statutory authority. It should be noted that this article does not discuss labor arbitration, which is an entirely different subject, or situations involving state law. State law varies and can constitute an additional, insurmountable barrier to arbitration by federal entities.[9]

Two major questions are answered. First, which federal entities, if any, can choose to arbitrate to resolve their contractual disputes?

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13 predominantly private corporations are the Communications Satellite Corporation (Comsat), the Federal Home Loan Mortgage Corporation, the Federal Land Bank Associations, the Federal National Mortgage Association, the Federal Reserve Banks, Gallaudet College, the Gorges Memorial Institute of Tropical and Preventive Medicine, Inc., Howard University, the National Consumer Cooperative Bank, the National Corporation for Housing Partnerships, the National Park Foundation, the Production Credit Associations and the Student Loan Marketing Association.

[8] Section 602(A) of the CDA states, in part, that:

> Unless otherwise specifically provided herein, this chapter applies to any express or implied contract . . . entered into by an executive agency for—
>
> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or
>
> (4) the disposal of personal property.

41 U.S.C. § 602(a)(1982). However, for purposes of this article, the terms "public contract" or "government contract" will also encompass nonacquisition contracts such as grants, cooperative agreements and financial assistance agreements between federal and private entities. All contracts entered into by entities created and funded by the federal government are covered.

[9] For example, in a dispute between Amtrak and the state of Illinois, the Illinois Court of Claims invalidated an arbitration clause in the Amtrak-Illinois contract holding that the court itself had sole jurisdiction under state law over all contract disputes involving the state. National R.R. Passenger Corp. v. Illinois, No. 82–CC–2554, slip op. (Ill. Ct. Cl. Sept. 22, 1982), *reh'g denied*, slip op. (Ill. Ct. Cl. Dec. 2, 1983).

Second, what factors should those entities that can arbitrate consider when deciding whether to do so? Although the first question has been addressed by previous commentators, the existence of new judicial and administrative decisions and the passage of the CDA give cause to reconsider the question. The second question has largely been ignored by previous commentators who appear to have assumed that arbitration is generally a desirable alternative to judicial settlement.

This article identifies the costs and benefits of arbitration in general. It then discusses the potential constitutional and statutory barriers to the use of arbitration by the federal government. Next, the characteristics of the CDA process are identified. Those entities not covered by the Act are also identified, since they have the ability to choose arbitration as a means to resolve their contractual disputes. Finally, arbitration is compared to the CDA mechanism, and the article concludes that the CDA is an acceptable substitute for, and in some situations preferable to, binding arbitration.

II. Arbitration: Costs and Benefits

Arbitration has been defined as

> a process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal. The parties agree in advance that the arbitrator's determination, the award, will be accepted as final and binding upon them.[10]

Arbitration has both benefits and drawbacks which must be considered in deciding whether to use it. This section addresses those costs and benefits.

A. The Benefits of Arbitration[11]

The relative speediness of arbitration decisions is frequently cited as a major advantage. Because of the very narrow scope of judicial review applicable to an arbitrator's decision, lengthy appeals are largely avoided. Studies of the typical commercial arbitration suggest that the average time from submission of a dispute to a final decision is only sixty days. Of course, how expeditious the arbitration process is depends in large part upon the parties. The degree of formality in the process, for example, is determined by agreement of the parties; and expeditiousness usually varies inversely with the degree of formality employed.

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[10] M. Domke, Domke on Commercial Arbitration, § 1:01 (rev. ed. 1983 & 1985 Supp.) at 1.

[11] *See generally,* R. Coulson, Business Arbitration—What You Need to Know (2d ed. 1982); Hardy & Cargill, *supra,* note 3 at 8–9; Note, *Authority of Government Corporations to Submit Disputes to Arbitration, supra* note 2; Note, *Arbitration and Government Contracts, supra* note 2.

A corollary to the relative speed of the arbitral decision is the lower cost to the parties resolving their dispute.[12] Because procedural and evidentiary rules may be relaxed, less time and, therefore, money is spent dealing with them. The limited availability of judicial review also results in less money being spent for the case on appeal. Again, the parties directly control the process and can agree to eliminate the costly elements of the arbitral process. For example, the parties may agree to eliminate the use of a transcript or to forbid the submission of briefs. Such agreements can make the process faster and less costly. From a policy perspective, if arbitration is less costly, the promise by the government to use such a procedure could encourage more businesses to bid for government supply contracts, since the potential cost of doing business with the government would be lower.

Because arbitrators are chosen by the parties themselves, it is likely that the arbitrator in a given case will be an expert in the area involved in the dispute. Presenting a case before an expert eliminates the necessity of educating the decision maker about the issues. Use of an "expert" should also result in a more informed decision.[13]

Arbitration, unlike adjudication, is a private dispute resolution system. Because the process does not occur in a public courthouse, both parties avoid publicity. It is also less likely that information concerning trade secrets or confidential information will be leaked.

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[12] Some observers have questioned the assumption that arbitration is cheaper than judicial settlement. *See* Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L.J. 36, 39 n.10 (1944); Crowell, *supra* note 6, at 6.

[13] Others argue that an expert decision maker who is a specialist in the particular area of disputes is actually a drawback. An "expert" is more likely to have a closed mind or preconceived notions about certain concepts involved in the litigation. Unlike an expert witness, an expert decision maker's bias cannot be exposed through cross-examination.

B. Negative Aspects of the Use of Arbitration

Arbitrators are not bound by previous court or arbitration decisions and they usually do not follow such decisions except in the area of labor arbitration. Because of this, parties are less able to assess their chances of prevailing. It is thus harder to predict the outcome of an arbitration than that of a court case.

While the ability to choose the arbitrator can result in the parties obtaining a person who has a special expertise in the area of conflict, it can also result in the selection of a person who is less detached and more dependent upon the parties. The parties pay the arbitrator's salary. The chance exists that an arbitrator will make a decision with an eye toward his role in future disputes involving one or both of the parties—that is, an arbitrator's decision might be influenced by the desire for future employment by the parties. Closely related to this is the frequent complaint that arbitrators "split the difference" too often. The desire for future employment could tend to produce such results.

Although the informality of the arbitration process may reduce the time and money needed to resolve the dispute, it may also be a drawback. "Formalities" help both to protect the due process rights of the parties and to assure a decision based upon all the facts. The formalities of evidence law, however, can keep relevant evidence out.

While finality of decision is an attractive element of arbitration, the limited scope of judicial review virtually eliminates the possibility of reversal of an unfavorable decision.[14] Simply stated, the parties are usually stuck with whatever the arbitrator decides.

III. Barriers to Arbitration Involving the Federal Government

As noted above, government agencies are generally prohibited from submitting disputes to arbitration, while a limited number of government corporations can agree to arbitrate disputes.[15] It is generally believed that this prohibition applies absent some specific statutory authorization to arbitrate.[16] Three statutes specifically authorize arbitration of contract disputes involving the government and private contractors: the Suits in Admiralty Act,[17] the Public Vessels Act,[18] and the Contract Settlement Act.[19] These three statutes[20] concern a very small percentage of government acquisition contracts. Some believe that the fact that Congress saw it necessary to specifically authorize arbitration in these instances validates the general prohibition.[21] However, most observers since the 1940s have viewed the prohibition to be valid only where specific statutes forbid arbitration.[22]

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[14] The U.S. Supreme Court in *Burchell v. Marsh* stated that "[i]f the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact." 58 U.S. 344, 349 (1854). Also, the United States Arbitration Act limits judicial review. *See infra* note 62. Finally, many arbitration awards are made without written opinions, making judicial review difficult.

A. Constitutional Barriers

Although there are apparently no constitutional barriers to the use of arbitration today, the prevailing view in the mid-1800s was that arbitration by the federal government was unconstitutional because the use of arbitration improperly vested judicial power in an entity that was not an inferior court created by Congress.[23] As courts became more receptive towards arbitration, the argument was abandoned.[24]

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[15] *See supra* notes 2 & 7 and accompanying text.

[16] *See, e.g.*, Note, *Arbitration and Government Contracts, supra* note 2, at 462.

[17] 46 U.S.C. §§ 741–52 (1982). Section 749 provides that

> The Secretary of any department of the Government of the United States . . . is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of sections 742, 744, and 750 of this title.

46 U.S.C. § 749 (1982).

[18] 46 U.S.C. §§ 781–90 (1982). Section 786 states that "[t]he Attorney General of the United States is authorized to arbitrate, compromise, or settle any claim on which a libel or cross libel would lie under the provisions of this chapter, . . ." 46 U.S.C. § 786 (1982).

[19] 41 U.S.C. §§ 101 *et seq.* (1982). Section 113(e) provides that "[t]he contracting agency responsible for settling any claim and the war contractor asserting the claim, by agreement, may submit all or any part of the termination claim to arbitration, . . ." 41 U.S.C. § 113(e)(1982).

[20] A fourth statute, the Foreign Assistance Act of 1961, contains a provision which permits "[c]laims arising as a result of investment guaranty operations [to] be settled, and disputes arising as a result thereof [to] be arbitrated with the consent of the parties, . . ." 22 U.S.C. § 2395(i)(1982). Such disputes could arise against the Agency for International Development.

[21] 32 Comp. Gen. 333, 335 (1953); *See* Hardy & Cargill, *supra* note 3, at 11; Note, *Authority of Government Corporations to Submit Disputes to Arbitration, supra* note 2, at 99–100.

[22] *See, e.g.*, Hardy & Cargill, *supra* note 3, at 11; Note, *Authority of Government Corporations to Submit Disputes to Arbitration, supra* note 2, at 99.

[23] United States v. Ames, 24 F. Cas. 784, 789 (C.C.C. Mass. 1845) No. 14,441.

B. Statutory Barriers

1. *31 U.S.C. § 1346*

Section 1346 of Title 31 prohibits the use of federal funds "to pay— (A) the pay or expenses of a commission, council, board, or similar group, or a member of that group" or "(B) expenses related to the work or the results of work or action of that group" unless authorized by law.[25] Historically, the Comptroller General has read this statute as barring the use of arbitration.[26] This reading of section 1346 has since been softened somewhat by rulings of the Attorney General and the Comptroller General that the use of the boards need only to be authorized "in a general way by law," rather than specifically authorized, in order to avoid the statutory prohibition.[27] This concept of "general" authorization probably permits government corporations to surmount the hurdle that section 1346 poses.[28]

There is a second possible basis for exempting government corporations from section 1346. That government corporations are closer to private entities than to public entities arguably places them completely outside the reach of the statute. The National Rail

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[24] The decline in judicial hostility towards the use of arbitration culminated in the passage of the United States Arbitration Act of 1925, 9 U.S.C. §§ 1–14, which rendered arbitration provisions enforceable and outlines the procedures to be used. For a review of the history of judicial hostility toward the enforcement of arbitration agreements prior to the passage of the United States Arbitration Act, *see* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982–85 (2d Cir. 1942).

[25] 31 U.S.C. § 1346(a)(1)(1982) (formerly 31 U.S.C. §§ 672, 673).

[26] 5 Comp. Gen. 417 (1925); *see generally* Braucher, *supra* note 2 at 477 (the Comptroller General's argument based on section 1346 "has largely been repudiated . . . but his conclusion has not").

[27] 27 Op. Att'y Gen. 432, 437 (1909); 40 Comp. Gen. 478, 479 (1961) ("General or specific authority to perform functions or duties is sufficient to allow payment of the expenses of boards, commissions, etc., if such duties or functions can be performed only by such a group or if it is generally accepted that such duties can be performed best by such a group"); 22 Comp. Gen. 140, 143 (1942).

[28] Note, *Authority of Government Corporations to Submit Disputes to Arbitration, supra* note 2, at 101–02. (Congress's grant to government corporations of broad contracting powers and the power to sue and be sued arguably authorizes, in a general way, the use of arbitration.)

Passenger Corporation (Amtrak) has made precisely this argument.[29]

The better view appears to acknowledge that government corporations are, in fact, government entities. Amtrak, like all federal government corporations, is a creature of Congress which receives substantial public funding. Its powers are strictly limited to those with which Congress vests it. Any theoretical independence which government corporations have is subject to the whim of Congress, which can alter the corporate structure or abolish the entity at any time. Furthermore, as a creature of Congress, government corporations are subject to congressional involvement in the contracting process.[30] Given these realities, it is best to view any agreement that a government corporation enters into as an agreement between the federal government and another party. Thus, the argument based upon the existence of "general" authorization is the best ground for avoiding the prohibition of section 1346.

The legislative history of section 1346 does not specifically address the question of use of arbitration by government entities. The legislative history does reveal a desire to prevent the expenditure of public monies on commissions and boards not authorized by Congress.[31] The intent behind the statute appears to have been

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[29] Letter from Christopher M. Klein, Deputy General Counsel, Amtrak, to Kirby Behre (Aug. 16, 1984). Amtrak views itself as "a private corporation, organized under the laws of the District of Columbia pursuant to the Rail Passenger Service Act. . . ." *Id.* Because it is a private corporation, the reasoning continues, the statutory barriers do not apply to it. Amtrak believes its for-profit status and the existence of shareholders in the corporation support its view.

[30] Congressional attempts to prohibit the United States Synthetic Fuels Corporation (the SFC), a government corporation, from entering into contracts with specific producers of synthetic fuels illustrates the fact that government corporations, despite their theoretical independence, are only as independent as Congress permits them to be. Congress can reduce that independence at any time without altering the legislation that created the corporation. The House of Representatives voted on August 2, 1984, to prohibit the SFC from entering into contracts for the construction of the Union II and Cathedral Bluffs projects. The SFC had already signed letters of intent with the companies involved in the two projects, but those letters were not legally binding. 1984 CONG. Q. WEEKLY REP. 1880. The Conference Committee later deleted this restriction on SFC's power

[31] Congressman Livingston, a member of the House Appropriations Committee, stated:

> [W]e have been living under a new era . . . that has established that the public moneys may be expended not alone under authority of law, but also by "executive choice," as illustrated by innumerable commissions, councils, and boards appointed solely by the President. The existence and activities of these bodies have made no inconsiderable drain upon funds appropriated for specific and

to prevent the executive branch from using commissions to cloak the expenditure of funds for unauthorized purposes. Under this reading, arbitration panels would not be prohibited since dispute resolution is not an unauthorized activity but a necessary element of an agency's power to contract. Despite the fact that arbitration panels thus appear to be outside the reach of the statute, section 1346 continues to be read as prohibiting their use.

Some observers have suggested that, assuming a prohibition on arbitration exists, it can be avoided by paying arbitrators from a source other than government funds.[32] This reading appears to ignore the prohibition of section 1346 against use of public monies to pay "expenses related to the work *or the results of work or action* of that group."[33] The phrase "or the results of" appears to prohibit the use of government funds to implement the decisions and findings of the arbitration board. If the statute does apply to arbitration by a government agency, it would seem to prohibit the use of public funds both to pay for the expenses of the process and to implement the arbitration decision.

Despite the Comptroller General's view that section 1346 prohibits binding arbitration, he has approved payment in instances in which arbitrators functioned only as appraisers.[34] Several Comptroller General decisions have permitted the use of arbitrators in situations in which arbitrators did not determine "questions of legal liability."[35]

In a 1940 decision,[36] the Comptroller General held that an arbitration provision in a contract between the Secretary of War and an aircraft contractor was valid because the arbitrator's role was limited to determining the appropriate sale price for the contractor's possible purchase of government-built plant facilities. Because the function of the arbitration panel was limited to making a factual determination of reasonable value "without imposing

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legitimate functions of government by misapplying the same to expenses of junketing about the country and in diverting the services of department employees from their proper and lawful occupations.

55 Cong. Rec. 3833, 3836 (Mar 4, 1909) (statement of Rep. Livingston).

[32] Braucher *supra* note 2, at 478 (arbitration by private citizens without fee or at the contractor's expense); Note, *Arbitration and Government Contracts*, *supra* note 2 at 463 (charging the contractor with the expenses of arbitration).

[33] 31 U.S.C. § 1346(a)(1)(B)(1982)(emphasis added).

[34] *See, e.g.*, 22 Comp. Gen. 140, 145 (1942).

[35] *See, e.g.*, 20 Comp. Gen. 95 (1940).

[36] *Id.*

any obligation on the Government," the Comptroller General reasoned that use of arbitration was not illegal.[37]

The Comptroller General used similar logic in a 1942 opinion,[38] holding that an arbitration provision in a restaurant lease at Washington National Airport was valid despite the existence of section 1346 (then section 673). The lease provided for a board of arbitrators to fix the rental rate upon the renewal of the lease. The Comptroller General reasoned that use of an arbitration panel was implicitly authorized by law, since the contemplated duties were those of appraisers, and it is generally recognized that such a determination is best done by an arbitration panel.[39] The Comptroller General also relied heavily on the "more important consideration . . . that under the proposed article any determination [by the board] . . . cannot serve to impose any additional obligation on the Government," since the lease expressly provided that the renewal terms could be no less favorable than the original terms.[40]

The distinction the Comptroller General has chosen to make is suspect. An arbitrator functioning as an appraiser does not, strictly speaking, decide questions of legal liability; but the result of an arbitrator/appraiser's decision is nearly identical to that of an arbitrator who resolves questions of legal liability. Both types of arbitrators settle monetary disputes and in so doing require that the government either disburse or receive a specific dollar amount. An arbitrator/appraiser's valuation is final and binding and in this sense does indeed "impose an obligation" on the government—it prevents the government from obtaining more money from a contractor or from reducing the amount of money it owes a contractor.

2. *31 U.S.C. § 3702*

A second potential barrier to the use of arbitration by a government entity lies in the Budget and Accounting Act of 1921.[41]

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[37] *Id.* at 99.

[38] 22 Comp. Gen. 140 (1942).

[39] *Id.* at 145; *see also* 11 Comp. Gen. 495, 497 (1932) (expenses not authorized because selection of architect and design for federal jails not a duty generally recognized as best performed by a commission).

[40] 22 Comp. Gen. 140, 145 (1942).

[41] 42 Stat. 23 (1921) (formerly 31 U.S.C. § 41–56, 71, recodified as amended in scattered sections of 31 U.S.C.).

Section 304 of that Act provides that "the Comptroller General shall settle all claims of or against the United States Government."[42]

This statute gives the Comptroller General jurisdiction over disputes involving money due on contracts; however, claims based upon tort or breach of contractual obligations are not part of section 3702 settlement authority.[43] Thus, section 3702 should not constitute a barrier to the use of another forum to resolve disputes that do not involve amounts owed. Yet, it has been interpreted in such a way as to raise a barrier to the use of arbitration by agencies. The statute has also been interpreted by the Comptroller General as inapplicable to most government corporations.[44]

As for agencies, a 1928 opinion of the Comptroller General[45] found that the Budget and Accounting Act of 1921 deprived the Department of Commerce of the power to use arbitration because the Act gave claims settlement authority to the General Accounting Office (GAO), of which the Comptroller General is the head. The Comptroller General suggested that the statute's "ample" provision of a forum for claims settlement was evidence that Congress did not intend to grant such power to agencies.[46] Another opinion in the same year found that where the statute does apply, "there is no power or authority in any administrative or contracting officer of the Government, by means of a provision in a contract, to establish or provide for a different procedure for the adjustment of such claims.[47]

To summarize, whether section 3702 prohibits a governmental entity's use of arbitration largely depends on whether the entity is an agency or a corporation. Corporations which can sue and be sued or settle their own claims are in no way confined by the statute. The statute bars an agency's use of arbitration if the dispute concerns a claim for money due and owing. For other claims, section 3702 does not give the Comptroller General jurisdiction and consequently does not bar arbitration. Of course, section 1346 effectively precludes arbitration by agencies in resolving unliquidated claims.

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[42] 31 U.S.C. § 3702(a)(1982).

[43] United States ex rel. Coates v. St. Louis Clay Prod. Co., 68 F. Supp. 902, 905–06 (E.D. Mo. 1946); *accord* Dennis v. United States, 20 Ct. Cl. 119, 120–121 (1885) (the Treasury Department had GAO's authority to settle claims before 1921). This distinction rests on the difference between a suit for unliquidated damages, not quantifiable until proven to the satisfaction of the factfinder, and a suit on account for money due and owing, the amount of which may be ascertained merely by arithmetical means.

[44] Comp. Gen. B–190806, April 13, 1978 (Pension Benefit Guaranty Corp.); Comp. Gen. B–179464, March 27, 1974 (United States Postal Service and the Panama Canal Company); 53 Comp. Gen. 337 (1973) (Federal Housing Authority). Because government corporations are generally authorized to settle their own claims and to have their financial transactions treated as final, the Comptroller General lacks such authority. 53 Comp. Gen. 337, 338 (1973) *citing* 27 Comp. Gen. 429 (1948).

[45] 8 Comp. Gen. 96 (1928).

[46] *Id.* at 97–98; *see also* 6 Comp. Gen. 140 (1926); 5 Comp. Gen. 417 (1925).

[47] 7 Comp. Gen. 541, 542 (1928).

C. Government Corporations

That government corporations are excepted from the general prohibition on the use of arbitration is supported by several cases upholding and enforcing arbitration agreements involving government corporations. However, none of these cases explicitly addressed the question of section 1346's general prohibition.

In *In re Reconstruction Finance Corp.*,[48] the Southern District of New York found that an arbitration clause was binding upon the Reconstruction Finance Corporation (RFC), a wholly owned government corporation and statutory successor to the Rubber Reserve Company. The RFC had tried to defeat the claim of a shipper of rubber that had contracted with the Rubber Reserve Company by urging that the arbitration clause could not be binding upon it since it was not an original party to the agreement. The court rejected that contention and referred the dispute, concerning allocation of the loss for rubber destroyed by enemy action, to arbitration. The court found that the "scope of the arbitration was not in any way confined."[49] The district court used the United States Arbitration Act[50] as a guide in its decision. On appeal, the Second Circuit also invoked the Federal Arbitration Act and affirmed the decision to refer the dispute to arbitration.

Reconstruction Finance Corp. demonstrates that the United States Arbitration Act can be successfully invoked with respect to a dispute involving a government corporation. This case, like the ones that follow, implicitly validates the idea that government corporations can agree to arbitrate their contractual disputes.

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[48] 106 F. Supp. 358 (S.D.N.Y. 1952), *aff'd*, 204 F.2d 366 (2d Cir.), *cert. den.*, 346 U.S. 854 (1953).

[49] *Id.* at 361. The court also held that the issue of whether the shipper's claim was barred by the statute of limitations was a question for the arbitrator. *Id.* at 362. That portion of the decision was later affirmed on appeal. 204 F.2d 366, 369 (2d Cir. 1953).

[50] 9 U.S.C. §§ 1 *et seq.* (1982).

In *George J. Grant Construction Co. v. United States*,[51] the Grant Construction Company sued the Commodity Credit Corporation[52] for delay damages in the construction of three hemp mills. The Court of Claims enforced a binding arbitration clause calling for a three-person arbitration panel.[53] However, in rejecting the contention that Congress "consented to have decisions made against the Government only in the Court of Claims,"[54] the court blurred not only the distinction between government agencies and government corporations, but also the distinction between arbitration by three-person panels and dispute resolution by the contracting officer. The court characterized the standard government disputes clause (providing for a decision by the contracting officer and an appeal to the department head) as "sort of arbitration."[55] The court reasoned that since this "in house" arbitration had been permitted by the Supreme Court,[56] arbitration by neutral third parties must be permitted as well.

Because of its broad language, *Grant Construction Co.* could have provided the rationale for use of arbitration agreements by government agencies as well as government corporations. One contemporary commentator saw the decision as "a beacon" showing the bright future for arbitration of government contract disputes.[57] Yet the case has since been ignored.[58]

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[51] 109 F. Supp. 245 (Ct. Cl. 1953).

[52] A predominantly federal corporation as classified by the GAO. *See supra* note 7.

[53] The arbitration clause specified that in the event of any disagreement arising under the contract, a three-person arbitration panel would be appointed. One member would be selected by each party and the third member selected by both parties' arbitrators. Edward E. Meyer Constr. Co. v. United States, 124 Ct. Cl. 274, 290–91 (1953) (contract "substantially identical" with contract in *Grant Construction Co.*).

[54] 109 F. Supp. at 247.

[55] *Id.* The standard disputes clause referred to by the court states as follows:

> ARTICLE 15. *Disputes.* Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

United States v. Wunderlich, 342 U.S. 98, 99 (1951); United States v. Moorman, 338 U.S. 457, 459 n.2 (1950).

[56] *Citing* United States v. Wunderlich, 342 U.S. 98 (1951), and United States v. Moorman, 338 U.S. 457 (1950). Both cases concern dispute resolution by the contracting officer of an agency; however, both cases were explicitly nullified by Congress when it passed the Wunderlich Act in 1954, 41 U.S.C. §§ 321, 322 (1982).

The final line of cases suggesting that government corporations may agree to arbitrate involves the National Railroad Passenger Corporation (Amtrak). In three separate cases, three different courts of appeals have enforced clauses providing for binding arbitration by a third party under the terms of the United States Arbitration Act.

In *National Railroad Passenger Corp. v. Missouri Pacific Railroad*,[59] the Eighth Circuit held that a dispute concerning Amtrak's contractual right to use rail lines owned by a subsidiary of the Missouri Pacific Railroad was arbitrable. The court stated that in light of the United States Arbitration Act its review was limited to two issues: (1) whether an agreement to arbitrate was made, and (2) whether there was a failure, neglect or refusal of the other party to perform that agreement.[60]

In *National Railroad Passenger Corp. v. Chesapeake & Ohio Ry.*,[61] the Seventh Circuit upheld a National Arbitration Panel award directing Amtrak to pay C&O more compensation than specified in their contract. This case is noteworthy not only because it upheld the imposition of a financial obligation on a government entity by an arbitrator, but also because it reiterated the narrow scope of review to be employed by the court. The court held that an improper construction of a contract by an arbitrator was not a sufficient basis for vacating the panel's award. Rather, the court's ability to vacate an award is "severely limited" to one of the grounds specified by section 10 of the United States Arbitration Act.[62]

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[57] Comment, *Validity of Arbitration Provisions in Federal Procurement Contracts, supra* note 3, at 458.

[58] One case, *Aktiebolaget Bofors v. United States*, 153 F. Supp. 397 (Ct. Cl. 1957), came close to addressing the issue of whether an arbitration agreement between a manufacturer and the Department of Defense was valid. It even cited *Grant Construction Co.* as precedent. However, in lieu of deciding the issue, the court held that the agency's failure to submit to arbitration did not give rise to a cause of action by the manufacturer against the United States. A decree for specific performance, the court reasoned, was not available against the United States since it had not consented to such suits, and a suit for damages "can . . . result in no more than the award of nominal damages, since a court cannot know what arbitrators would have decided, if there had been arbitration." 153 F. Supp. at 399. Therefore, the manufacturer's assertion that the agency breached the arbitration provision of the contract was not cause for judicial remedy.

It is also interesting to note that none of the Amtrak cases cite *Grant Construction Co.* as authority for arbitration. *See infra* notes 59, 61, and 63 and companying text.

[59] 501 F.2d 423 (8th Cir. 1974).

[60] *Id.* at 427, quoting Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711, 714 (7th Cir. 1967).

[61] 551 F.2d 136 (7th Cir. 1977).

The third case, *Seaboard Coast Line Railroad v. National Rail Passenger Corp.*,[63] concerned a suit by Seaboard Coast Line over compensation due for services rendered to Amtrak. Amtrak moved pursuant to section 3 of the United States Arbitration Act[64] to stay the litigation pending arbitration. Both parties had entered into an arbitration agreement. SCL argued that arbitration would violate various provisions of the Interstate Commerce Act.[65] The district court referred the case to arbitration and SCL took an interlocutory appeal.

The Fifth Circuit affirmed the lower court's referral to arbitration. It held that the parties' dispute was on its face one governed by the arbitration agreement. The court confirmed the standard outlined in the earlier Amtrak cases that a stay of litigation should be granted "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.[66]

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[62] *Id.* at 141–42. Section 10 of the United States Arbitration Act permits the court to vacate an arbitration award

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10 (1982).

[63] 554 F.2d 657 (5th Cir. 1977). The case was remanded to decide whether various provisions of the Interstate Commerce Act applied. *Id.* at 661. *See* 489 F. Supp. 916 (M.D. Fla. 1980), *aff'd*, 645 F.2d 513 (5th Cir. 1981).

[64] 9 U.S.C. § 3 (1982).

[65] 49 U.S.C. §§ 10761, 11101(a)(1982).

[66] 554 F.2d at 660, quoting United States Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960).

These Amtrak cases indicate that the courts have generally assumed that: (1) Amtrak can enter into binding arbitration agreements, (2) Amtrak can invoke the United States Arbitration Act, and (3) the scope of judicial review, whether before or after an arbitration decision, is narrow.

Previous commentators have not fully discussed this increasing body of precedent supporting the proposition that arbitration is permissible, at least for government corporations.[67] It is arguable that these cases do not persuasively support the legality of arbitration because the government's authority to arbitrate was never specifically at issue in any of them. Nevertheless, four federal courts of appeals, the Court of Claims and a district court have enforced arbitration provisions involving federal entities, providing solid support (albeit by implication) that government corporations can arbitrate. Since there are forty-seven government corporations which receive billions of dollars in federal funding, the impact of this finding is potentially great.

IV. The Contract Disputes Act of 1978

The Contract Disputes Act of 1978[68] created a uniform dispute resolution process applicable to acquisition contracts[69] entered into by executive agencies. The term "executive agency" is defined as including wholly owned government corporations as listed in section 9101 of the GCCA.[70] Some thirteen government corporations are wholly owned.[71] The CDA process is mandatory, since the Federal Acquisition Regulation (FAR) requires that a disputes clause incorporating the CDA procedures be included in all agency acquisition contracts.[72]

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[67] *See, e.g.*, Hardy & Cargill, *supra* note 3, at 14 (citing only the *Grant Construction Co.* case as precedent supporting the legality of arbitration. As mentioned above, that opinion contained blurred distinctions between government corporations and agencies and is, therefore, not of particularly strong precedential value); Katzman, *supra* note 3 (article does not discuss either *Reconstruction Finance* or *Grant Construction Co.*, both of which were decided before the article was written).

[68] 41 U.S.C. §§ 601–613 (1982).

[69] *See supra* note 8. It is not directly applicable to grants, cooperative agreements or financial assistance agreements, although, given the wording of the statute, an agency could choose to use its board and the CDA procedure in disputes concerning such agreements. *See infra* note 105.

[70] *See supra* note 7.

[71] *Id.*

[72] FAR 33.214 requires the contracting officer to insert the Disputes clause,

The CDA process is fairly straightforward. The CDA requires that the contractor involved in a government contract dispute obtain a final decision from the contracting officer.[73] The contractor can then appeal to either (1) the appropriate Board of Contract Appeals (BCA) or (2) the United States Claims Court.[74] Appeal from a decision of a BCA or the Claims Court lies to the U.S. Court of Appeals for the Federal Circuit, but the United States can only appeal from the BCA if the agency head so decides and the Attorney General approves.[75]

The first step in the CDA process is to attempt to negotiate and settle the dispute. If negotiations fail, the next step is to seek a final decision from the contracting officer. For claims involving $50,000 or less, that decision must be made within sixty days of when the claim was filed.[76] In situations where the claim involved is more than $50,000, the contracting officer need only decide within a "reasonable time," but must inform the contractor within sixty days of receiving the claim how long that reasonable period will be.[77] The contracting officer's findings of fact are not binding in any subsequent proceeding.[78] The final decision must be in writing, state the reasons for the decision, and inform the contractor of his right to appeal.[79]

After receiving the contracting officer's final decision, the contractor can appeal to the appropriate BCA within ninety days.[80] Appeals to the Claims Court must be made within one year.[81] Both

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FAR 52.233–1, in all solicitations and contracts unless the contract is with a foreign government, foreign agency, or international organization (or subsidiary body of that organization) and the agency head determines that "the application of the Act to the contract would not be in the public interest." FAR 33.203(b). The Disputes clause states that "[t]his contract is subject to the Contract Disputes Act of 1978. . . ." FAR 52.233–1. It is clear that Boards will not enforce an arbitration agreement if it circumvents an established dispute procedure. Dames & Moore, IBCA No. 1308–10–79, 81–Z BCA ¶ 15,418.

[73] 41 U.S.C. § 605(a)(1982).

[74] 41 U.S.C. §§ 606, 609(a)(1)(1982).

[75] 41 U.S.C. § 607(g)(1)(B)(1982).

[76] 41 U.S.C. § 605(c)(1)(1982).

[77] 41 U.S.C. § 605(c)(2)(1982). If the contracting officer fails to issue a decision within the required time, the failure to do so will be deemed a denial of the claim and will authorize commencement of the appeal or suit. 41 U.S.C. § 605(c)(5). However, a court or BCA may stay its proceedings to obtain a final decision by the contracting officer if it sees fit. *Id.*

[78] 41 U.S.C. § 609(a)(3)(1982).

[79] 41 U.S.C. § 605(a)(1982).

[80] 41 U.S.C. § 606(1982).

[81] 41 U.S.C. § 609(a)(3)(1982).

forums have similar discovery procedures and the same remedies.[82]

An important advantage to appealing to the appropriate BCA is that, in the case of claims of $50,000 or less, the CDA imposes deadlines on the BCAs. For claims involving $10,000 or less, ("small claims") the contractor may elect an expedited procedure that requires a single Board member to issue a decision within 120 days whenever possible.[83] There is no judicial review available of such a small claims decision.[84] For claims involving $50,000 or less, the contractor can elect an accelerated procedure, in which appeals are to be resolved within 180 days, whenever possible.[85]

Only agencies that are found from a workload study to have the volume of disputes necessary to justify the establishment of a full-time board of at least three members are permitted to have their own boards.[86] Agencies lacking their own boards may arrange to use the board of another agency.[87]

BCA members are appointed and serve in the same manner as administrative law judges.[88] BCA resolution of disputes is to be "informal, expeditious, and inexpensive."[89] Any appeal from the BCA's decision to the Federal Circuit (the CAFC) must be taken within 120 days of receipt of the BCA's decision.[90] Appeals to the CAFC from the Claims Court must be brought within thirty days.[91] Findings of fact, but not law, are final and conclusive if supported by substantial evidence.[92] BCAs have subpoena power.[93]

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[82] 41 U.S.C. §§ 607(d), 610 (1982). *See generally* Peacock, *Discovery before Boards of Contract Appeals*, 13 Pub. Cont. L.J. 1 (1982).

[83] 41 U.S.C. § 608(a)(1982).

[84] 41 U.S.C. § 608(d)(1982). The elimination of judicial review of an administrative decision under this section appears to conflict with the Wunderlich Act, 41 U.S.C. §§ 321–22 (1982). That Act provides that "[n]o Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative or board."

[85] 41 U.S.C. § 607(f)(1982). *Id.* at § 322.

[86] 41 U.S.C. § 607(a)(1)(1982).

[87] 41 U.S.C. § 607(c)(1982).

[88] 41 U.S.C. § 607(b)(1)(1982). Administrative law judges are appointed pursuant to 5 U.S.C. § 3105 (1982).

[89] 41 U.S.C. § 607(e)(1982).

[90] 41 U.S.C. § 607(g)(1982).

[91] 28 U.S.C.A. §§ 1295(a)(3), 2522 (West Supp. 1985); Fed. Cir. R. 10(a)(1); Fed. R. App. P. 4(a)(1).

[92] 41 U.S.C. § 609(b)(1982).

[93] 41 U.S.C. § 610 (1982).

V. A Comparison of the Contract Disputes Act Process with Arbitration

Generalizations about either arbitration or the CDA process are difficult. The advantages and disadvantages of each will vary depending upon the facts and circumstances involved. However, the criteria discussed as the costs and benefits of arbitration[94] offer rough grounds upon which to compare the two dispute resolution systems.

A. Speed

The caveat concerning the imprecision of generalizations is particularly relevant in comparing the relative speed of each dispute resolution process. Arbitration has been universally heralded as a fast process, at least in part because there are no other cases to compete for the arbitrators' time.

Because of the availability in smaller cases of accelerated procedures, the speed with which disputes are resolved under the CDA varies according to the amount involved. The CDA process could theoretically be quicker than court settlement in light of the time limits it imposes on the decisions of the contracting officers and the BCA. For example, in a claim involving $50,000 or less, the contracting officer must make a final decision within sixty days of receiving the claim. The contractor can then elect to appeal the decision to the BCA, which must "whenever possible" issue its decision within 180 days. The BCA decision can be appealed to the Federal Circuit, but the CDA places no time limit on that court. Thus, in a case involving $50,000 or less, a contractor may have two administrative decisions made in 240 days or less.

The similarities between arbitration and CDA resolution are even more pronounced when a "small claim" is involved. For claims involving $10,000 or less, the contractor will receive the contracting officer's decision within sixty days, and a single Board member's decision "whenever possible" within 120 days. Since there is no judicial review of the Board member's decision, a final and binding decision may be obtained in 180 days or less. Small claims dispute resolution under the CDA is thus very similar to arbitration in terms of speed and finality.

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[94] *See supra* at Section II.

If statistics compiled in the early 1970s accurately reflect the present composition of contract claims, the "fast track" procedures provided by the CDA for claims involving $50,000 or less could affect a large percentage of government contract claims.

> Small claims [during the early 1970s were] the bread and butter of the board of contract appeals. In the early 1970s, twenty-two percent of all claims to boards were for under $1,000, fifty-one percent under $10,000, and sixty-three percent under $25,000.[95]

Yet figures compiled by the Armed Services Board of Contract Appeals (the ASBCA) suggest that the number of proceedings conducted under the accelerated and expedited procedures is currently much more modest. In fiscal year 1985, only 262 of 1,293 appeals (20.3 percent) disposed of by the ASBCA were conducted under those provisions of the CDA.[96] The average prime contractor claim in 1984 was $241,096, well above the $10,000 and $50,000 cut-offs.[97] Figures do suggest, however, that the Board generally makes its decisions within the time-frame indicated in the CDA for the expedited (120 days) and accelerated (180 days) appeals. The average number of days on the docket (from date of docketing to date of decision) in cases involving such appeals was 149 in 1985, 151 in 1984, 156 in 1983, 173 in 1982, 171 in 1981, and 190 in 1980.[98] Overall, the average time a claim of any size was on the ASBCA docket was 484 days in 1985, or about 15.5

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[95] Hardy & Cargill, *supra* note 3, at 2, citing REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, vol. 4, at 15 (1972).

[96] REPORT OF TRANSACTIONS AND PROCEEDINGS OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS FOR THE FISCAL YEAR ENDING 30 SEPTEMBER 1984 (October 31, 1984) (hereinafter "ASBCA Report"). The ASBCA is the largest of the 12 agency Boards of Contract Appeals with 33 members. With a docket size of about 1,300 cases, it handles approximately 42 percent of the 3,100 cases filed with the 12 boards. No other board compiles the figures referred to in the text. The other 11 boards, and their number of members and approximate docket size, are as follows: the General Services Board of Contract Appeals (11 members and 450 cases); the Engineer Board of Contract Appeals (six members and 450 cases); the boards of the Department of Transportation, the Department of the Interior, the Postal Service, the Department of Agriculture, and the Veterans Administration (all have four members and handle about 100 cases each); the National Aeronautics and Space Administration, the Department of Housing and Urban Development, the Department of Energy, and the Department of Labor (all have three members and handle fewer than 100 cases each). FEDERAL BAR ASSOCIATION BOARD OF CONTRACT APPEALS COMMITTEE, MANUAL FOR PRACTICE BEFORE BOARDS OF CONTRACTS APPEALS (1981).

[97] ASBCA Report, *supra* note 96.

[98] *Id.*

months.[99] This figure suggests that for appeals not accelerated or expedited, the time it takes to get an agency decision can be long.

One factor possibly affecting the time and cost of an arbitration decision is the arbitrator selection process. If the selection were on an *ad hoc* basis, the government agency involved might spend considerable time developing a list of acceptable arbitrators and conducting background checks on those individuals. It is not hard to imagine the use of government-wide regulations for the selection of arbitrators. Disappointed applicants for arbitrator positions might protest the selection of other individuals, and agencies might be required to give such applicants a hearing. A search for acceptable arbitrators each time a dispute arose would be costly to the government and would require the use of agency personnel. Use of the Boards of Contract Appeals requires no such search, since they are standing bodies.

B. Expense

Because judicial review of arbitration decisions is severely limited, the parties to an arbitration need usually only spend time and money to prepare and present a case before one forum. Parties to a BCA appeal, on the other hand, sometimes must prepare and present their case before two forums: the BCA and the Federal Circuit. This fact alone can account for higher costs to the parties under the CDA system. If the theory of arbitration holds true in a particular case, arbitration will produce additional savings because there is less judicialization in an arbitration than before a BCA. This advantage is negated if the parties to an arbitration demand judicialization.

In large disputes, the reduction or elimination of the use of discovery or briefs can result in substantial savings. However, the more money that is at stake the greater the chance that parties will insist on greater due process protection. Where the claim is for $10,000 or less, the CDA's small claims procedure is so similar to arbitration[100] that there would not be a financial reason to choose arbitration over it.

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[99] *Id.*

[100] See *supra* at Section IV.

A party contemplating the use of arbitration should consider what savings, if any, are likely to occur in light of the particular dispute. How much judicialization will both sides require? If it is a complex dispute, will discovery and briefs be massive and costly to prepare? If so, will the parties agree to eliminate or substantially curtail the use of discovery and the writing of briefs? Would the parties split the cost of paying the arbitrator's salary? Will any savings that result from choosing arbitration be offset by the fact that arbitrators are more likely to split the amount in dispute, thereby reducing a party's potential recovery? Is it likely that a disappointed party will seek review of a BCA decision? Because the parties have direct control over an arbitration they can directly affect the cost of the process. Whether they are willing to take cost-cutting measures, and the concomitant trade-off in terms of due process considerations, will vary from case to case.

C. Formality

As noted, parties choosing arbitration can agree upon the level of formality they prefer. Yet the parties will not always opt for less formality. A growing concern in labor arbitration is that it is becoming too formalized as the parties demand more and more judicialization.[101] Yet, if figures concerning prehearing discovery are any indication of overall formality, the ASBCA has not been overly judicialized. Twenty-three percent of the ASBCA cases in FY 1985 involved prehearing discovery in which rulings were sought.[102] Where the small claims procedure is selected, the CDA requires that simplified rules of procedure be used.[103]

D. Expertness and Independence of the Decision-maker

The CDA method of selecting members of the BCAs helps to ensure that board members are experts in federal acquisition law. Section 607(b) requires that board members be selected in the same manner as administrative law judges, i.e., solely on the basis of merit. In addition, members must have at least five years of experience in public contract law.[104]

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[101] Ashe, *Arbitration Finality: Myth or Reality?* 38 ARB. J. 42 (1983).

[102] ASBCA Report, *supra* note 96.

[103] 41 U.S.C. § 608(b)(1982).

Despite these congressional efforts to ensure expertness, board members are arguably not totally independent since they are selected by the agency heads and paid by the agency. The BCA members might be viewed as agents of the agency they serve and, therefore, more sympathetic to the agency viewpoint. Yet the OPM removal procedure helps to prevent the Board members from fearing retribution by his or her agency for "improper" decisions.

The theoretical independence of board members is even more uncertain when a board is involved in a matter which an agency has voluntarily decided to assign to it.[105] There is nothing to prevent an agency from taking an issue out of the hands of a board with which it has voluntarily invested it.

The parties are less likely to find an "expert" decisionmaker when they appeal to the Federal Circuit. Because the cases brought before the CAFC often concern matters other than public contract law, the judges are not as specialized as Board members or arbitrators might be. Also, unlike BCA members, judges are selected through the political process rather than strictly on merit.

As noted earlier, the parties to an arbitration select the arbitrators and in this way control the qualifications of those who will decide their case. In some cases, selection of an arbitrator requires some research. But while the parties to an arbitration can select an arbitrator with particular experience in the area of dispute, it is safe to say that the parties do not lose the advantage of having an expert hear their case when they choose to use the BCA process.

E. Privacy

Hearings before and decisions of the BCAs are public, unlike private arbitration decisions. While parties to an arbitration can agree to keep silent about their dispute and not release the arbitrator's decision to the public, parties using the CDA have no such choice. BCA opinions are released to the public. If an arbitration decision is appealed to a court, however, the facts of the dispute can become public.

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[104] 41 U.S.C. § 607(b)(1)(1982).

[105] The CDA does not prohibit an agency from having its board decide matters not covered by the CDA. The only apparent limit is the requirement that members have no other inconsistent duties. § 607(a)(1). For example, the Department of Energy uses its Board to decide debarment cases. Because an agency can use its board for extra-CDA activities, disputes involving grants, cooperative agreements, or financial assistance agreements, as well as disputes involving government corporations not covered by the CDA can be given to a board for decision. The agency head can remove such matters from board jurisdiction at any time.

F. Uniformity of Decisions and Precedent

That an arbitration panel is convened solely for the dispute involved and is disbanded once it makes a decision all but eliminates the possibility that arbitration panels could establish a body of public contract law that other panels would follow. Because the panels are entities of limited purpose and duration, their members do not feel compelled to follow previous decisions. Because there is no guarantee of uniformity of decisions by public contract law arbitrators, the parties are less able to evaluate their chances for success.

The BCAs, on the other hand, have developed a large body of law, and parties to a dispute frequently cite decisions of BCAs other than the one hearing their case as support for their position. It is only in the small claims area that decisions are deemed to have "no value as precedent for future cases."[106] In general, a party desiring to rely upon precedent is best advised to use the CDA process.

G. Judicial Review

The statutory language in the United States Arbitration Act concerning judicial review creates a very limited ground upon which a court can set aside an arbitrator's award. An arbitration award can be set aside only if a court finds corruption, fraud or undue means, finds that the arbitrator refused to hear material evidence, or that the arbitrator exceeded his or her power.[107] Because it is very difficult to have a decision vacated under these standards, parties are less likely to appeal the decision.

Judicial review of BCA decisions is more searching than that of arbitration decisions. BCA decisions on questions of law are not final or conclusive on the CAFC. The CDA provides for judicial review under the "clearly erroneous" standard.[108] The committee report that accompanied the CDA specifically states that "[t]he 'substantial evidence' standard of review will no longer be used for review of agency board decisions."[109] The clearly erroneous standard is fairly limited but it is more searching than the scope of review employed by courts in reviewing arbitration decisions. A party that hopes to get some review of the decision maker's adverse action should be aware that the CDA standard is more advantageous. But for parties willing to forego meaningful review in order to save time and money, arbitration is the better alternative.

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[106] 41 U.S.C. § 608(e)(1982).

[107] 9 U.S.C. § 10 (1982). *See supra* note 62.

VI. Conclusion

This article has addressed two major questions concerning the use of arbitration to resolve federal public contract disputes. First, which federal entities can agree to arbitrate their contractual disputes? Secondly, what are the costs and benefits of arbitration that those federal entities must consider in deciding whether to use arbitration?

Concerning the first question, all government agencies and those government corporations covered by the Government Corporation Control Act (GCCA) and consequently the Contract Disputes Act must use the CDA system to resolve disputes concerning federal acquisition contracts. (However, one-time deviations from the regulations which implement the CDA are theoretically possible.) Since the CDA covers only acquisition disputes, government corporations covered by the GCCA can arbitrate in nonacquisition situations. Government corporations not covered by the GCCA can arbitrate any dispute, whether it involves acquisition contracts or not.

In addition, there appears to be a flat ban on any use of arbitration by agencies, given the Comptroller General's interpretation of 41 U.S.C. § 1346. The justification for the flat ban on the use of arbitration by agencies is of questionable strength. The Comptroller General's interpretation of a seemingly inapplicable statute as barring the use of arbitration and the fact that the CDA process is mandatory is at the heart of the present justification.

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[108] S. REP. No. 95–1118, 95th Cong., 1st Sess. 1, 30, *reprinted in* 1978 U.S. CODE CONG & AD. NEWS 5235, 5264.

[109] *Id.*

It is not altogether clear why government corporations are excepted from the general ban. Numerous courts have upheld arbitration agreements involving government corporations, but none have addressed the legal justification for allowing those entities to arbitrate.

The second question concerns the costs and benefits of arbitration. It is simplistic to assume that arbitration is preferable to administrative or judicial settlement in all circumstances. Government entities and government contractors must conduct a cost-benefit analysis of arbitration and any alternative dispute resolution system before deciding which method to use. Disputes involving entities not covered by the CDA and disputes beyond the reach of the CDA can nevertheless be decided by the CDA boards if an agency head so agrees. Government corporations that can arbitrate should consider arranging to use a BCA to decide their disputes.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Proposed Recommendation

Assuring the Fairness and Acceptability of Arbitration in Federal Programs

The Administrative Conference has recommended that agencies employ alternative means of dispute resolution (ADR) in federal programs.[1] ADR techniques for rulemaking include structured negotiation and mediation; for adjudication, they also include arbitration, factfinding and minitrials.[2] The bulk of these techniques do not alter the placement of policymaking authority within the agencies, and therefore pose few of the legal and policy concerns of binding arbitration, which typically involves the use of outside arbitrators authorized to make decisions binding upon the government. If an arbitrator decides a claim by or against the government, public money will be involved. Arbitration decisions concerning other issues in administering a federal program, such as the resolution of enforcement cases, or disputes between the agency and its employees, affect administration of the program. In programs where the agency's role is to resolve disputes between private parties, arbitrated disputes will relate to the purposes of the program, for example by resolving common facts with those involved in program administration. In addition, the Constitution requires that significant duties pursuant to public law must be performed by Officers of the United States and their employees. Fidelity to this principle can be ensured if Congress in authorizing the use of arbitration or the agency when adopting arbitration confines it to appropriate issues and provides for the agency's supervision of arbitration.

Existing law authorizes resort to arbitration in a variety of different contexts, including claims by and against the government, disputes between private individuals that are related to program administration, and labor relations issues between the government and its employees. Recommendation 86-3 calls on Congress to act to authorize agency officials to choose arbitration to resolve many additional disputes.

This recommendation contains procedural guidance for Congress, and occasionally agencies, in an effort to ensure the fairness and acceptability of arbitration in federal programs. The criteria are necessarily general, and the appropriateness of particular arbitral procedures must be judged in the context of the particular functions they serve. Agencies are generally in the best position to assess the need for informal and expeditious process, and to weigh that need against considerations of accuracy, satisfaction, and fairness. While the Conference encourages granting agency officials broad "on-the-spot" discretion to use arbitration, it recognizes the need for preliminary steps to meet concerns that the process provide some executive oversight, preserve judicial functions, ensure quality decisions, and to minimize concerns over the legality and fairness of the process. This recommendation sets forth procedural criteria to aid Congress and agencies in taking these first steps.

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[1] *See* generally Recommendation 86-3.

[2] *See* Recommendations 82-2, 82-4, 84-4 and 85-5.

RECOMMENDATION

1. In all cases, congressional authorization for arbitration should ensure that Congress has made, or the agency will make, an explicit judgment that arbitration is appropriate for the case or class of cases in question. Criteria for determining whether arbitration is appropriate include the following:

(a) Cases subject to arbitration should involve questions of fact or the application of well-established norms, even if statutory, rather than precedential issues or application of fundamental legal norms that are evolving.

(b) In determining whether to employ arbitration, Congress or the agency should consider the nature and weight of the private interests involved, the nature and weight of the government's interests, and the tradeoffs between the costs and benefits of arbitration and those of more formal processes. For example, questions about eligibility to participate in a federal entitlement program are not likely to be suitable for arbitration, because the need for procedural protections is likely to outweigh cost considerations. Still, once eligibility to participants has been established, disputes over particular monetary claims or levels of benefits under such a program are prime candidates for arbitration, due to the heavy adjudicative caseload and need for specialized decision.

2. Congress should assess the desirability of authorizing mandatory arbitration in light of the extent to which a person's participation in the affiliated program is voluntary.[3] For example, participation in an entitlement program is more likely to reflect need than consent, and should not be regarded as consent to arbitration of eligibility.

3. Congressional authorization for arbitration should ensure that:

(a) The agency has an opportunity to choose whether to resort to arbitration,[4] and to review the overall composition of the arbitral pool to ensure its neutrality and, where appropriate, specialized competence. Agencies should either employ arbitral pools and procedures that are well-established, such as those of the AAA, or should develop pools to meet their special needs.[5]

(b) The agency that is a party to an arbitrable controversy has a role in the selection of the arbitrators, consistent with preserving the neutrality of the decider, for example by striking names from a list; and

(c) Arbitral awards are reviewed by agencies or by courts under the criteria of the U.S. Arbitration Act, which authorizes review of the facial validity of the award and the integrity of the process. Review of individual awards can be allocated to the agency.[6] If so, no special provision need be made for judicial review of individual awards. Judicial review of the overall structure and fairness of the arbitration program should suffice. In the rare case in which a serious constitutional issue attends an individual arbitration, such as an allegation of a taking, existing law provides avenues for relief.

4. Agencies should ensure that the standard for arbitral decisions is reasonably specific, by promulgating administrative standards where statutes do not sufficiently guide arbitral decision. A substantial justice standard for arbitral awards should be used only when

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[3] *See* Conference Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, for other limitations on the use of mandatory arbitration.

[4] *See* Id.

[5] *See* Conference Recommendation 86-8, ¶ 1(c), *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution.*

[6] *See* Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution.*

explicitly approved by the agency, because of the resulting difficulties of administrative or judicial review of the outcome. The sufficiency of other standards should be judged by whether the parties can consent meaningfully to arbitration and can prepare their cases, whether the arbitrators can produce reasonably consistent decisions, and whether reviewing entities can judge the facial validity of awards.

5. The following considerations should govern the ongoing administration of arbitral programs:

(a) Agencies should be careful to preserve the neutrality of arbitration by avoiding instructions to arbitrators or forms of oversight that would threaten to undermine the arbitrator's neutrality in particular cases. Any effective guarantee of the arbitrator's neutrality, such as mutual selection by the parties, will suffice.

(b) Authority to determine the arbitrability of particular disputes can be placed in the courts, as under the U.S. Arbitration Act, or in another neutral third party, such as the administering agency where arbitration concerns private parties, or in an agency other than one which is a party to arbitration.

(c) Rulemaking can alter the standards for future arbitration when monitoring of awards reveals outcomes inconsistent with the agency's expectations in employing arbitration.

2. BACKGROUND ON DISPUTE RESOLUTION MECHANISMS

D. Other

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THE NEGOTIATIONS ALTERNATIVE IN DISPUTE RESOLUTION

JOHN T. DUNLOP†

I. INTRODUCTION: THE EMERGENCE OF THE NEGOTIATED RESOLUTION

In Western societies there have been two approved arrangements over the past century or two for resolving conflicting interests among groups or organizations and their constituent members: the marketplace and government regulatory mechanisms established by the political process. Markets in various institutional forms[1] bring together buyers and sellers without visible hand, to set prices of goods, services, and various factors of production, including land and capital assets. Markets provide the terms of exchange and thus resolve, largely impersonally, disputes between potential buyers and sellers over the countless features of transactions. Adam Smith stated early in the *Wealth of Nations* more than two hundred years ago:

> Give me that which I want, and you shall have this which you want, is the meaning of every such offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interest.[2]

In addition to providing markets with legal status, the political process has established government institutions, from courts to administrative tribunals, to resolve many other conflicts and differences of interests and to restrain methods of conflict. Also, the political process has established and nurtured the "public household"[3] or public sector that complements, competes with and alters the private market economy.

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[1] *See* J.T. Dunlop, *Labor Organization, Markets, and Economic Vitalization*, in STRATEGIES FOR PRODUCTIVITY, INTERNATIONAL PERSPECTIVES 11-20 (1984) (symposium sponsored by Japan Productivity Center).

[2] A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 14 (1937) (discussing the principle which creates the division of labor).

[3] D. BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 220-27 (1976). Bell defines the "public household," as it is expressed in the government budget, as "the management of state revenues and expenditures." *Id.* at 221. This concept stands in juxtaposition to the concept of "domestic household," the goods "not val-

It is not this article's purpose to recount or explain the development of markets or the growth of the "public household," including regulatory institutions, in Western societies or the United States.[4] Rather, the starting point is to note that the received ideas and institutions present to resolve conflicting interests consist of both markets and governmental regulation.

There is abundant evidence that the American community since the Great Depression places less reliance on markets to achieve social purposes, including the resolution of conflicting interests, despite the deregulation movement of the past decade.[5] In international trade, for example, the doctrinaire support for free trade and free markets for international commerce has been supplemented or replaced by a complex network of reciprocal and bilateral agreements negotiated in various forums as reflected in the arrangements for sugar, coffee, tin, wheat, textiles and apparel, steel and other manufactured goods, maritime cargos and airplane fares, not to mention the migration of people across national boundary lines. In the labor market, the presence of collective bargaining, minimum wage regulation, health and safety standards, and pension and nondiscrimination requirements emphasizes the extent to which reliance on the market has been qualified. The regulations of the SEC, Federal Reserve System, Comptroller of the Currency and the housing finance agencies, fair housing rules, and the Internal Revenue Code, among others, constrain capital flows and money markets. The complex of regulations affecting specific product markets, from public utilities through consumer and producer goods, including agricultural products, has greatly expanded, constricting buyers and sellers and changing the nature of these markets. Moreover, wage and price controls, or some form of incomes policy, were in effect for twenty-two out of the forty-four years that followed 1940.

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ued . . . because they are not exchanged in the market," such as a housewife's services, and "market economy," valuing goods by the prices used in the exchange of money. *Id.* at 220. The idea of "public household" stresses the use of the government's budget to distribute its assets to various sectors of the society. *Id.* at 226-27.

[4] *See* A. Chandler, Jr., The Visible Hand: The Managerial Revolution in American Business (1977); C. Lindloom, Politics and Markets, The World's Political-Economic Systems (1977); C.L. Schultze, The Public Use of Private Interests (1977).

[5] Dunlop, *The Limits of Legal Compulsion*, in Issues in Health Care Regulation 184-91 (R. Gordon ed. 1980). *See also* M.L. Weidenbaum, The Future of Business Regulation: Private Action and Public Demand (1979) (discussing methods by which the business system best serve the public).

The costs of the complex of regulatory mechanisms, including the distortion of decisions, financial outlays, litigation, delays and greater uncertainty, have come to be increasingly recognized as a heavy burden which complicates the resolution of conflicting interests.[6] The uneconomic consequences of some regulations have helped to cause the rediscovery of the market in the past decade and to advance deregulation, as in developments affecting airlines, trucking and communications.[7] The deregulation movement may still expand, although it is difficult to see deregulation growing faster than the political propensity to regulate. The main thrust of the past generation must clearly be characterized as a movement away from reliance upon the market.

Negotiations and negotiation processes appear to be on the ascendancy as compared to markets; in recent years, they have been increasing even when compared to public regulations. It is not uncommon, for instance, for private corporate suits to be settled by direct negotiations between the companies, or with the government, as in the instance of a telecommunication antitrust case after more than twelve years.[8] The major disputes involving the price and supply of uranium between Westinghouse and certain utilities have been settled by direct negotiations and the withdrawal of court suits.[9] The device of plea bargaining on economic questions likewise is illustrative of the general distrust of pure regulation and public agency decision and the tendency to resort to negotiations to limit uncertainty, to speed resolution, and to assure greater attention to features of a settlement that are of special concern to each party. Contestants often achieve a more satisfactory and less risky settlement by direct negotiations, or negotiations with the staff of a public agency, than would be likely were the proceedings to run their full litigious course.

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[6] *See, e.g.*, Arthur Anderson & Co., *Cost of Government Regulations Study for Business Roundtable* (March 1979) (a study of the direct incremental costs incurred by 48 companies in complying with the regulations of six federal agencies in 1977) (available at University of Pennsylvan library); E.F. Denison, *Effects of Selected Changes in the Institutional and Human Environment upon Output per Unit of Input*, SURV. CURRENT BUS., Jan. 1978, at 21-44 (explaining the costs of pollution abatement, employee safety programs, and crime).

[7] *See* D. MARTIN & W. SCHWARTZ, DEREGULATING AMERICAN INDUSTRY (1977) (comparing advantages and disadvantages of deregulation).

[8] *See Telecommunications Regulation Today and Tomorrow* (E.M. Noam ed. 1983) (discussing the 1982 consent agreement in which AT&T agreed to divest itself of the Bell Operating Companies after the Antitrust Division of the Justice Department brought suit against it).

[9] For a discussion of the facts surrounding this occurrence, *see* Westinghouse Elec. Co. v. Kerr-McGee Co., 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978).

A variety of specialized mediation and arbitration devices also have been developing in recent years to facilitate agreement-making and to reduce litigation and formal court processes in fields outside of the industrial relations arena, which has used such methods for many years and where the institutional arrangements are well established.[10] Thus, malpractice suits, home or product warranty controversies, price or product differences among owners, contractors and architects in construction, or differences between manufacturers and converters in textiles and apparel, or some equal employment opportunity controversies are new areas in which disputes have been submitted to mediation or arbitration under voluntary arrangements developed and administered by the American Arbitration Association. A number of courts have experimented with special mediators, including the Bronx Housing Court in disputes between landlords and tenants, and in some courts in divorce cases.[11] A number of organizations have sprung up, such as Resolve, to encourage the settlement of complex controversies between environmentalists and businesses by using direct negotiations and mediation.[12] In all these cases, procedures that are faster, less expensive and more subject to the interests of the contending parties are replacing more formal and legalistic determinations.[13] It can be expected that these methods of dispute resolution will spread and be more extensively utilized.

Negotiations have not only extended into the resolution of individual cases and disputes; they are also utilized to resolve controversies over public regulations and rule making,[14] and indeed, in the accommodation of differences over the legislation itself. The procedures used to enact the Arab boycott legislation, the 1979 Trade Liberalization Act and the 1983 Social Security amendments, are illustrative of the successful resort to negotiations procedures prior to and outside the established process. In Massachusetts, the legislation reforming the administration of public employee pensions, including disability pensions, and creating the Public Employee Retirement Administration was negotiated and mediated among various private and governmental interests, including legislators, before enactment.[15]

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[10] *See* M. DOMKE, COMMERCIAL ARBITRATION 24-30 (1965) (discussing the American Arbitration Association and how arbitration protects victims injured by uninsured motorists); G. GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION 93-109 (2d ed. 1983) (arbitration in a dispute between an architect and a home owner).

[11] *See* Kraut, *Domestic Relations Advocacy—Is There a Better Alternative?*, 29 VILL. L. REV. 1379 (1984) (outlining the special role of the mediator in family dispute proceedings in Chester County, Pa.).

[12] *See* G. Cormick & L. Patten, Environmental Mediation: Defining the Process Through Experience (Feb. 1977) (paper prepared for the American Association for the Advance of Science, Symposium on Environmental Mediation Cases, Denver, Colorado; the authors are associated with the Office of Environmental Mediation, University of Washington).

[13] *See generally* L.S. BACOW, BARGAINING FOR JOB SAFETY AND HEALTH (1980). For example, Bacow notes that the GM-UAW and the steel industries have provided for more stringent health and safety arrangements than the standards set by OSHA. *Id.* at 86-87.

[14] Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393 (1984).

One needs to be careful about the meaning of the statement that negotiations are an alternative to or replacement for markets and governmental determinations. It is easy to see that there may have been a change in form or appearance, but the reality is more complex. As with wage and price controls or collective bargaining, market forces are not entirely displaced or replaced. Sooner or later, they continue to operate, limit and shape, to some degree, the decisions made through the new institutions. It is erroneous to assert either that the new institutions make no difference, or that the decisions are entirely different since the market or the regulations have been altered to a negotiations form. Rather, the reality is that both old market forces and new ones generated by the new institutions operate through the new institutions, yielding more or less different results, to be assessed in each situation.

Collective bargaining, for instance, does change the performance of labor markets in many ways not appreciated by econometric studies. The tendency of collective agreements in many industries to be set for three-year terms, or differences between the parties in pure bargaining skills and power, or institutional interests in fringe benefits or union security may be expected to result in somewhat different terms and conditions of employment over time than would arise through markets or under governmental dictation. The quality of management and its policies as well as the characteristics of the labor force are altered. But it would be simplistic to hold that market considerations have been entirely displaced or eliminated. The substitution in form, from market to a negotiations form, has complex results that differ significantly from the market results.

The penetration of negotiations into the arena of governmental determinations, similarly, is not merely a change in institutional form. The costs and time of settlement are likely to be less than protracted litigation. The opportunity to influence more directly the outcome and to secure attention to issues of most vital concern is often greater. These factors are likely to yield different results through negotiations than through litigation or other formal processes. It must be remembered, though, that in the course of negotiations, the possibility of reverting to a court, to an administrative agency or to legislative bodies is likely to be a continuing influence, and the emerging precedents of litigation are likely to influence relative positions and bargaining tactics. With regard to negotiations on some issues subject to regulatory decisions, such as employment discrimination or protected activity cases, agreements or settlements are subject to attack and to displacement in the very tribunals that negotiations are intended to circumvent. It cannot be denied, however, that negotiating a settlement with one or more adversaries, or with a governmental administrative agency or in a court is a different process with somewhat different results than a commitment to litigation and formal processes.

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[15] *See* Mass. Gen. Laws Ann. ch. 7, §§ 49-50 (West Supp. 1984).

The field of industrial policy has come to be an area of intense ideological debate, including the role of negotiations and tripartite committees in establishing and administering policies relating to economic growth and industrial configuration. *Business Week*, in an editorial on the strategy for rebuilding the economy, urges "[t]he leaders of the various economic and social groups that compose U[nited] S[tates] society to agree on a program for reindustrialization and present that program to Washington."[16] The AFL-CIO has repeatedly proposed a tripartite National Reindustrialization Board "to carry forward a rational national industrial policy."[17] The *Wall Street Journal* takes a different editorial position:

> The only industrial policy we need is one that offers the maximum possibility for individual decision makers to apply their initiative and imagination, take their risks and reap their rewards when their judgments are correct. As a group they will be right far more often than government bureaucrats not subject to the disciplines and incentives of the market.[18]

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[16] *A Strategy for Rebuilding the Economy*, BUS. WEEK, June 30, 1980, at 146. This editorial recognizes the necessity of reindustrializing the United States and proposes a five step method to redo the manufacturing sector of the economy. *Id.* These five steps include: 1) agreement on a program of reindustrialization between the leaders of different sectors of the economy, 2) tax cuts for investments and subsidies or tax preferences for research and development spending, 3) a different type of federal budget, 4) redirection of investments away from housing loans and toward research and expert activities, and 5) promotion of exports. *Id.*

[17] *Jobs: The Agenda For Recovery*, THE AFL-CIO AMERICAN FEDERALIST, Jan. 8, 1983, at 5, 8, *reprinted in* AFL-CIO NEWS, Jan. 8, 1983.

[18] *Neolib Nonstarters*, Wall St. J., Oct. 19, 1982, at 34, col. 1. This editorial discussed a new industrial policy which would favor winning or "sunrise" industries

These introductory observations have been to call attention to the reality of the growing importance of negotiations in resolving real or potential conflicting interest among groups in our society. Negotiations have been making inroads on both markets and governmental mechanisms. These changes are more complex than the apparent changes in form. The expansion of negotiations brings with it growing controversy over the independent consequences of negotiations. The study of markets and, more recently, the study of regulation, are both well established in the disciplines of economics and law. The negotiations process deserves to be much better and more widely understood.

II. APPROACHES TO NEGOTIATIONS

There are a variety of approaches to explicate the negotiations process. A considerable amount of literature utilizes formal models seeking to explain bargaining generally and collective bargaining negotiations in particular.[19] At one time I developed a model of bargaining power (with Benjamin Higgins) based upon different degrees of competition in related product and labor markets and the "pure" bargaining power of negotiators to determine a wage rate.[20]

There are at least two major difficulties with the applicability of abstract models of negotiations. The first is that they are typically simplified to a single issue, such as money, or they assume that other issues are translatable into money on some stable trade-off, effectively creating a single issue. The second difficulty arises from the usual presumption that the negotiators constitute monolithic entities. They are portrayed as having no significant internal differences among the constituent members of the negotiating organizations and no differences between these members and their negotiator. Also, in these abstract models any internal differences which are used are entirely constant throughout the negotiations. In my experience, these sim-

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with tax breaks, loan guarantees and other subsidies, while not doing the same for losing or "sunset" industries. *Id.* The editorial expresses skepticism about the ability of government technocrats to predict which industries will be winners and which losers and instead favors a more market oriented industrial policy. *Id.*

[19] *See* W.N. ATHERTON, THEORY OF UNION BARGAINING GOALS 3-30 (1973); J. PEN, THE WAGE RATE UNDER COLLECTIVE BARGAINING (T. S. Preston trans. 1959); I. STAHL, BARGAINING THEORY (1972); C.M. STEVENS, STRATEGY AND COLLECTIVE BARGAINING NEGOTIATION (1963); Korman & Klapper, *Game Theory's Wartime Connections and the Study of Industrial Conflict*, INDUS. & LAB. REL. REV., Oct. 1978, at 24-39.

[20] Dunlop & Higgens, *"Bargaining Power" and Market Structures*, J. POL. ECON., Feb. 1942, at 1-26 (this model utilized the concepts of supply and demand of labor, indifference functions of enterprises and degrees of monopoly).

plifcations, essential to analytical rigor, are too abstract to be very helpful for providing much insight into the class of negotiations which are of central concern to me.

Another approach to explicate negotiations is through the use of experimental or simulated bargaining games.[21] In some instances a class is divided into groups to represent the negotiating parties, initial positions are defined for each, and rules of play are specified. The process can generate substantial interest and apparent involvement of the participants.

There has been some effort to use econometric methods to measure aspects of arbitration or collective bargaining. Public sector bargaining has been used most often in view of the availability of data.[22] The results appear to me to be unimpressive; situations are always changing in some respects, and these studies do not appear to center on fundamentals.

There is an approach to negotiations that constitutes an almost verbatim account of the exchanges from the earliest stages of negotiations to the achievement of a settlement.[23] In recent years more condensed case studies of negotiations have been developed for courses in schools of business, law and public policy.[24]

A somewhat different approach is developed in this article: to limit the types of negotiations considered and then to outline a number of key principles that are central to an understanding of the negotiations process. These principles grow out of reflecting on experience; they seek to blend analysis and art forms.

The types of negotiations considered in this article have at least three characteristics that eliminate some negotiations from our concern in the universe of all negotiations. First, parties or organizations expect to continue to be engaged and to interact over a future period. Thus, the direct sale/purchase of a house between individuals who are unlikely to have any interaction in the future ever again or a transaction by a visitor to a garage sale are a species of negotiations excluded from these principles. In the negotiations under consideration in this article, events during negotiations, in the agreement-making process, or in the breakdown of negotiations, are likely to be significant to the performance of the parties following negotiations. Second, the negotiators represent organizations or groups within which there are important differences in preferences among the constituent members. These relative preferences for bargaining objectives may even shift during the course of negotiations, particularly when the negotiations are protracted. The parties to our negotiations are not monolithic. Third, the negotiators are concerned with more than a single issue, or with one that can be decomposed into more than one subissue. Thus, whenever money is an issue, there is the issue of effective dates of any change in money. Compensation typically has a variety of dimensions. While one issue may be more significant to one party, as compared to others, I have yet to meet a real single issue dispute, recognizing that issues typically are decomposed into a variety of dimensions, or components.

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[21] *See* H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982) (setting forth several game methods involving games against specified players, games not involving any interaction with any player, and games of deception). *See also* DeNisi & Dworkin, *Final Offer Arbitration and the Naive Negotiator*, INDUS. & LAB. REL. REV., Oct. 1981, at 78-87. This article analyzes a game in which undergraduate students played the role of labor and management. *Id.* at 78-79. It concludes that negotiators try harder to reach their own settlement and feel more positively about their opponents when they fully appreciate the final offer procedure. *Id.* at 86.

[22] *See* Butler & Ehrenberg, *Estimating the Narcotic Effect of Public Sector Impasse Procedures*, INDUS. & LAB. REL. REV., Oct. 1981, at 3-20.

[23] *See, e.g.*, A. DOUGLAS, INDUSTRIAL PEACEMAKING (1962) (describing events at the negotiating table and beyond, and providing an update on the mediation proceedings between the Atlas Recording Machine Company and Local 89 at the OPQ International Union); E. PETERS, STRATEGY AND TACTICS IN LABOR NEGOTIATIONS (1955) (using examples and case materials drawn from the author's experience as a California labor conciliator to analyze the nature of industrial conflict).

[24] *See* J.A. HENDERSON, CREATIVE COLLECTIVE BARGAINING (J.J. Healy ed. 1965); B.M. SELEKMAN, S.K. SELEKMAN & S.H. FULLER, PROBLEMS IN LABOR RELATIONS (1950).

The framework for analysis of negotiations outlined in the next section may provide some insight into these excluded classes of negotiations, but that is not the present primary purpose.

Labor-management negotiations in the United States are characterized by the three inclusions defined above, although few private negotiations are so precisely specified by public policy. The labor organization is certified by law as the exclusive representative of the employees in a precisely defined job territory.[25] The management is clearly identified by law. The subjects over which the parties are or are not required to bargain are also defined by law. The obligation to bargain in good faith[26] has been defined by statute and case law in great detail. The labor organization has the obligation to represent all employees in the bargaining unit fairly and without discrimination,[27] including discrimination against any minority group of employees confronting a majority of employees. Negotiations are to begin a specified number of days before the expiration of the old agreement. Some methods of conflict in negotiations, for example, relating to a picket, a boycott or violence, are permitted by law while others are prohibited.[28]

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[25] 29 U.S.C. § 159(a) (1982).

[26] *Id.* § 158(d).

[27] *Id.* § 158(b).

III. FRAMEWORK TO ANALYZE NEGOTIATIONS

The central purpose of this article is to assist those who observe a negotiation through the press, second-hand accounts, or report of isolated events of negotiations to understand better direct negotiations and the role of associated mediation.

No outsider can ever fully participate in an ongoing negotiation or a mediation process. This framework and statement of principles is designed to facilitate a keener intellectual appreciation of what is happening.[29] Despite a spate of recent volumes that advertise that one can learn to "negotiate agreement without giving in" or "get the best out of bargaining," I am inclined to believe that the art of negotiations can only be learned by experience, and often hard experience. A framework for analysis may, however, provide a perspective on what happens in negotiation and reduce the learning time or, perhaps, the pain of experience.

The framework presented below is not highly abstract or elegant. It does, however, reflect a first approximation of experience and analysis of the roles of various negotiating parties in diverse settings.

A. *Internal Agreement*

Each group or organization that is party to negotiations to seek an agreement has diverse internal interests. Therefore, an internal consensus or formal approval by each party is required to permit the consummation of a negotiated agreement. Thus, in the instance of two parties, it takes three agreements to achieve one agreement: an agreement within each party as well as one across the table. In the instance of three parties, it takes four agreements to achieve one agreement. This simple proposition is a fundamental to agreement-making.

The parties to negotiations, among continuing groups or organizations, are never a monolith. Attention to the conflicting interests and internal governance for negotiations is essential to observe perceptively agreement-making or to participate effectively in the process. A great deal of the negotiations process is devoted subtly to communications concerning internal priorities and reactions to various proposals and counterproposals.

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[28] *See, e.g.*, *id.* § 158(b). Subsection (b)(4)(ii)(B) of this section is intended to prohibit secondary picketing by a union involved in a dispute with a primary employer, where the picketing forces a secondary employer to choose between keeping its customers or continuing to deal with the target of the worker's dissatisfaction. Kroger Co. v. NLRB, 947 F.2d 634, 637 (6th Cir. 1981). However, under § 158(b)(4), informational picketing at a common work situs, such as picketing designed to advise the public that an employer pays wages that are lower than union wages, is lawful. Texas Distribs., Inc. v. Local Union No. 1005, 598 F.2d 393, 398 (5th Cir. 1982) (interpreting 29 U.S.C. § 158(b)(4) (1982)).

[29] *See* J.T. DUNLOP & J. HEALY, COLLECTIVE BARGAINING: PRINCIPLES AND CASES 53-68 (1953).

In the negotiations in 1975 over the five-year grain agreement between the Soviet Union and the United States, for instance, there were diverse interests within the United States. These diverse interests were concerned with the volume of grain to be sold in 1975 and beyond, the urgency of reaching an accommodation, the consequences on domestic living costs, how to resolve a longshoremen's work stoppage and achieve the use of American tonnage in grain shipments, and the need to include in the document an agreement with the Soviets for oil purchases below the OPEC price. These divergent interests were in part reflected in the different agencies of the government. The Departments of State, Agriculture, Labor, Commerce, OMB and the White House, among others, were all involved in making recommendations to the President on the positions in the negotiations. Although the United States negotiators may have had less hard information, it could be presumed there were some internal differences to be accommodated at some levels within even the Soviet government on questions of immediate needs, agricultural policies, storage capacity, shipping rate structure and oil prices.[30] In the end, the United States had to abandon any linkage to oil if it was to achieve an agreement and the Soviets were under pressure to reach a negotiated settlement if it were to secure the grain volume it sought. The grain agreement, and the related shipping agreement, required considerable internal accommodation and congruent internal positions within each side—three agreements to achieve one formal agreement.

The private collective bargaining process well illustrates the same principle. The negotiating proposals of a labor organization are ordinarily initially put together from the aspirations of a wide range of members and subsidiary groups; the management proposals are no different. The union comprises diverse interests. Younger workers may be more interested in health care, older workers in pension benefits and retired workers in adjusting pensions for increased living costs. Workers in various departments or plants may place high priorities on local working conditions. Women or minorities may regard as their top priority new elements in an affirmative action program. Unemployed workers may be most concerned with supplemental unemployment benefits and the extension of health care benefits. In multi-company bargaining the marginal company employees may be concerned with job security and employment compared with a high priority for wage increases among higher profit companies, and so on. The collective bargaining and negotiations process requires the labor organization (and management) to assess these competing opportunities and to seek a settlement, before or after a work stoppage with a "package" which is congruent with management's (the labor organization's) internal acceptances. The negotiation process eliminates many of the initial aspirations of both sides and seeks mutually consistent items and magnitudes—three agreements to achieve the agreement ratified by the internal procedures of each party and made public.

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[30] R.B. PORTER, PRESIDENTIAL DECISION MAKING: THE ECONOMIC POLICY BOARD 123-56 (1980). It appears that the Soviets were looking at other grain markets, and some Russian officials did not like the publicity that the purchases would generate. *Id.* at 125 & n.3.

The diversity in management is evident most clearly in public sector negotiations where mayors, city councils or boards of selectmen, finance committees and personnel bodies may be at odds. These differences are exacerbated by partisan and personality rivalries, and they materially complicate agreement-making and ratification.[31]

The emphasis on the internal diversity and complexity of each organization that is party to the negotiations suggests that each negotiator appreciate the informal governance of each side in order to understand the proposals and counterproposals made in the negotiations. It is vital to sense the priorities sought by each side, and the severity of their opposition to proposals, in practice, rather than merely in formal positions or in public pronouncements. Each negotiator, and indeed mediator,[32] needs to be sensitive to the possibilities of putting together "packages" of items to constitute an acceptable settlement in view of the respective priorities and negative evaluations of particular proposals. Indeed, negotiations or mediation is often the art of putting together packages that recognize the true priorities on each side that will "sell" to both parties informally as well as in any formal ratification process. It takes three agreements to resolve the dispute.

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[31] *See* J. BROCK, BARGAINING BEYOND IMPASSE: JOINT RESOLUTION OF PUBLIC SECTOR LABOR DISPUTES 144-49 (1982). Brock writes: "A personality conflict, even if it has little to do with the issues at hand, can be damaging to the bargaining relationship . . . and thus impede settlement." *Id.* at 147.

[32] *See* W.E. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING (1971).

B. *The Initial Proposals*

In negotiations the initial proposals for an agreement by any party tend to be large or extreme relative to eventual settlement terms, except in the case of a very few negotiators. It is important for observers or negotiators to understand the reasons for such inflated proposals and the functions that large initial proposals play in the negotiations process. They should not be simply dismissed with moral indignation as unreasonable; they often reveal a great deal about the internal complex of the side making the proposals.

Many initial proposals are large because they reflect the way they were put together, usually by simply assembling the aspirations of the divergent groups which comprise each party to the negotiations. In order to cut back or scale down proposals, it is essential to establish priorities among groups within the negotiating organizations, as suggested in the first principle. While some culling of raw proposals may be made initially, the process of priority setting and scaling back proposals for one party or another is often an integral part of the bargaining process itself.

Initial proposals may be extensive or large as a deliberate act on the part of negotiators to secure the reactions of the other side. At the outset it is not always clear which items or proposals may be of interest or be most acceptable to the other side or elements of the other side. A wide and diverse menu may permit explorations that otherwise may not take place. Some proposals are also planted for future years. John L. Lewis initially proposed the novel idea of royalty per ton of coal mined for health care of miners as a means to compel the diversified owners to study the approach seriously for the next negotiations.[33]

When negotiations may be protracted or when the environment of the negotiations may be expected to change significantly, the initial proposals may be large to accomodate such changed circumstances. Parties are likely not to want to make proposals which may appear grossly inadequate to their constituencies after six months or a year of negotiations. Therefore, larger or more extreme initial proposals protect the negotiations from drastic changes in circumstances.

Initial proposals may be substantial to facilitate negotiations strategy calling for the abandonment or reduction in some items in response to movement by the other party. If a negotiator has advanced only a minimum or final position, it will not be possible to make concessions to see what effects such a change may have on the other party. The need to maneuver in negotiations also encourages large initial proposals.

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[33] *See* D.F. SELVIN, THE THUNDERING VOICE OF JOHN L. LEWIS 193-220 (1969) (outlining benefits achieved by Lewis as president of the UMW union).

It was observed above that there are a few situations in which initial proposals for an agreement by a negotiator may be close to the final settlement. Such a strategy may be followed, in my experience, by a negotiator with very considerable authority and prestige so that there is credibility, and when there likely is strong support for the approach within the organization represented. The tactic has the advantage that once it has been successfully established in a previous negotiation, it may contribute to its own success in future negotiations. But the tactic has very limited applicability. The tactic of take-it-or-leave-it from the beginning of negotiations is a dangerous ploy for all but the strongest and most prescient. The process of negotiating from large initial proposals to more reasonable ones is still the ordinary course of negotiations.

C. *The Art of Changing Positions*

Negotiations constitute the process by which authorized representatives from the different sides, starting from positions that are initially apart, often far apart, change their positions to seek to achieve a procedural or substantive agreement. A procedural agreement would settle a dispute, for instance, by referral to arbitration or to some other tribunal for resolution.

The change in the formal position of a party in negotiations is always accomplished with a certain amount of difficulty since a concession may be interpreted as a weakness and invite expectations for further yielding. Yet changes in positions by negotiators, ordinarily substantial changes, are required if the differences between the parties are to be narrowed and an agreement is to be achieved. But each apparent concession tends to create on the other side the impression of a willingness to yield further in continuing negotiations. If a negotiator has reduced (or raised) his offer ten cents an hour, the other side will argue that a further movement is appropriate to close the remaining gap between the parties on that issue. Moreover, an explicit concession once made is almost impossible to withdraw as a practical rather than as a formal or legal matter. It should be no surprise that concessions from initial or previous proposals are often accompanied by the refrain, "This is our last offer" or "This is our last proposal" before some deadline or projected breakoff in negotiations.

At the outset of negotiations, after the lists of formal proposals have been submitted, each negotiator is likely to enjoy the full support of its organization, and there are sharp conflicts across the table. The positions are far apart and each side has a united constituency on rather extreme proposals. In the course of negotiations, as spokesmen change their positions and make concessions, more and more tension tends to arise within each group just as it may ease across the bargaining table. As each initial proposal is dropped or modified, internal support from additional constituencies may be lost. Indeed, it is a practical rule-of-thumb that as one is nearing agreement across the table, there is more difficulty within each side than between the leading spokesmen across the table. Each principal negotiator is often as much preoccupied with handling the internal conflicts and shaping proposals to satisfy the internal necessities as in handling controversy with the opposing negotiator. Changing positions creates internal tensions, making internal agreement more difficult.

The way in which negotiators for organizations change their positions in order to move toward a settlement is an art form involving considerable style in handling tensions internally as well as across the table. In my experience the characteristic which most distinctively separates experienced from inexperienced negotiators is the way in which they are able to effectuate changes in positions without creating expectations of further concessions and the way they can "read" suggestions of the other side for possible changes in previous positions. These differences in talents and skills do make a difference in the substantive outcomes of negotiations. A related element, absolutely essential to the art of changing positions, is the capacity to listen perceptively and to read between the lines. Timing or mutual understanding of the moods on the two sides is likewise critical to effective negotiating.

In the early stages of negotiations, it would not be unusual for a change in position to be reflected by the withdrawal or scratching of some items from the agenda of one or both sides. But as the negotiations proceed the discussions are often centered on various "packages" of proposals. While a change in position may be reflected in a modification in the magnitudes of the items in the "package," a change may also be signaled by discussing a "package" modified to exclude some items or to add some items more desirable to the other side. These combinations may not be presented as formal offers or modifications in positions but only as different "packages" for exploration. Only later may a formal change in position or a withdrawal of an item be conceded.

There is often considerable ambiguity over the status of various package proposals and their composition. At a given stage of the negotiations it may be quite uncertain what is in dispute and what, if anything, has been agreed upon. This is due to an axiom of negotiations providing that there is no agreement until all items in dispute have been resolved one way or the other, unless otherwise explicitly specified. The negotiations process ordinarily consists of steps involving changes in position, or indications of willingness to change, while preserving positions should the negotiations fail to reach a settlement in the current round or forum of negotiations.

Regardless of how artful or clumsy in execution, negotiations is the process of changing positions in movement toward a resolution of the dispute.

D. *The Role of Deadlines*

A deadline serves a vital function in negotiations. It compels each side to reach decisions and establish priorities that would not otherwise occur, at least not so rapidly. The temptation to procrastinate and to hope the issue will go away or can be postponed is recurrent. In the absence of a deadline, as with a strike or a lockout in collective bargaining, or in a court proceeding or other mandated decision-making in government regulatory agencies, the negotiators or mediators often create artificial deadlines to try to bring issues "to a head" and to resolution.

The passage of time is not ordinarily neutral with respect to the interests and fortunes of each party. Time may run more towards one party than the other, and one or the other may hope for a more favorable setting in which to settle or reach agreement. A deadline is an institutional design in negotiations to reduce dilatory postponement. It could be a natural deadline, as in the expiration of an old collective bargaining agreement, or a synthetic one, created by no less a necessity than to catch an airplane or report to another scheduled meeting.

The question is repeatedly asked as to why negotiations are not settled until a deadline, often at midnight or in the wee hours of the morning, even after a symbolic stopping of the clock. An appreciation of this distinctive feature of negotiations involves the series of points made above concerning the essential nature of negotiations between continuing organizations. The "end game" of negotiations involves concessions, from one side or the other or both, that are more vital than those changes in position previously made, and they are likely to prove more difficult to make. The less valuable "chips" have already been surrendered. Moreover, settlement involves complex trade-offs, often in "principle," between one group of the constituency and another as they involve different aspirations of the same constituency that is now required to face more realistically the opportunity costs of any priority and what must be conceded to achieve the objective.

These internal decisions involve complex communications. Often there are sharp differences of internal views which are likely to have become acute as negotiations have continued and more concessions have been made. A deadline requires a reconsideration of the easy view that the other side is likely to "blink" first, and it forces a hard review of the consequences of nonagreement. These consequences are more realistic when they are imminent than when viewed in anticipation months ahead. A deadline is an essential ingredient to such hard choices and decisions. Students well understand that it often takes a deadline to produce a term paper.

E. *The Final Concession*

The endplay of negotiations poses distinctive problems and opportunities that may facilitate agreement or freeze positions into obdurate obstacles to settlement. In the endstage of negotiations the number of issues is reasonably limited and defined, and the distance between the parties are moderate. The critical problem is that each side would prefer the other to move to avoid a further concession itself; any move creates the serious enigma of creating the impression of being willing to move all the way to the position of the other side. The negotiating situation is delicate. As explained in the next section, a mediator can play a vital role. In the absence of a neutral, it is common for the one or two key persons from each side to meet privately at lunch or elsewhere, even without the advanced knowledge of their colleagues, to span the remaining gap. The final steps are seldom taken at the table, although they must be confirmed there and by ratification.

Ronald Reagan, in his autobiography, reports on his experience in negotiations as President of the Screen Actors Guild:

> I was surprised to discover the important part a urinal played in this high-altitude bargaining. When some point has been kicked around, until it swells up bigger than the whole contract, someone from one side or other goes to the

> men's room. There is a kind of sensory perception that gives you the urge to follow. . . . Then, standing side by side in that room that levels king and commoner, comes an honest question, "What do you guys really want?" . . . Back in the meeting, one or the other makes an offer based on this newly acquired knowledge. . . . Then the other returnee from the men's room says, "Can our group have a caucus?" That is the magic word, like the "huddle" in football—it's where the signal is passed.[34]

F. *The Changing Site of Negotiations*

An essential feature of all negotiations is the determination by each negotiator at an early stage whether the other party is serious about reaching an accommodation at the current "table" or whether the parties are engaged in "going through the motions" to end in some subsequent further negotiations in some other forum with some other representatives, or whether the negotiations are a sham concealing a prospective conflict designed to end in the extinction of one party. This judgment is often not easy to make, but it has decisive effects upon the negotiations. There are many negotiations that are perceived by both sides to be preliminary to further negotiations; as long as both sides have the same perceptions, serious difficulties may be avoided. Different expectations, however, can be the source of major conflict and lead to charges of bad faith.

It is axiomatic that negotiations recognized to be preliminary to a further stage are unlikely to elicit best offers. However, very important functions relating to factual information, exploring priorities among issues, alternative approaches, and sensing internal considerations may be achieved.

In some labor-management negotiations it is possible to envisage a succession of "tables" at which the dispute may be negotiated. Local parties may be followed by national and headquarters representatives of the two organizations; top officials may participate; a succession of mediators and government officials may seek to mediate the dispute; formal factfinding with recommendations may be voluntarily agreed upon or required by legislation; a succession of further negotiations and mediation may follow factfinding; the physical locale of the negotiations may shift a number of times. The White House or the governor may intervene in certain disputes. The negotiators will want to anticipate such shifting "tables" because the timing of concessions is vital to the negotiators, and mediators may expect additional flexibility in positions.

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[34] R. REAGAN & R.G. HUBLER, WHERE'S THE REST OF ME? 225 (1965).

Some negotiations, at least on the part of one side, may be regarded as a way to secure delay, to postpone legal proceedings, or to secure a lapse of time thought to be favorable to one's position. In such instances the procrastinating side is likely to pay scrupulous attention to the form and protocol of negotiations but to avoid problem solving. While it is vital for an observer or a participant to know whether a case has these characteristics, the determination is often not easy to make.

Among continuing organizations that deal with each other on an ongoing basis, negotiations may at the outset take on the character of mutual problem solving. The process involves careful development of the factual basis of a problem, areas of agreement or disagreement over the facts, including the need for further investigation. The identification of both the more objective character of the problem and the organizational concerns for both parties are likely to be explored. There follows an exploration of alternative resolutions of the problem, as redefined, and the costs and acceptability of each approach to each party. An accomodation, formally or informally, may then be accepted for a temporary or a longer period. In this mode negotiations are problem solving; the negotiators are not characterized simply as traders seeking a sharp advantage. The difference is vital to long term constructive relations between the organizations or groups.

G. *The Use of Conflict*

Negotiations do not preclude overt conflict, and both may take place simultaneously. Thus, negotiations may begin or continue with a strike or lockout, litigation, political activity, or while public campaigns are also under way. It may be difficult for an organization to conduct warfare and diplomacy simultaneously, but separate representatives of an organization are often involved. In these circumstances, conflict is another form of pressure directed to the bargaining table, and bargaining strategy may take on the form of another element of conflict. It must, of course, be recognized that overt conflict, in the circumstances of ongoing negotiations, may in the course of the conflict, or as a consequence of the results of conflict, alter the position of one side or the other in negotiations. Indeed, that is typically the purpose of the conflict, to facilitate agreement on more favorable terms or more rapidly.

H. *The Need for Secrecy*

Negotiations are not fruitfully conducted in public, in the press or in the media. Indeed, an indication that negotiators may be serious about reaching a settlement or be willing to explore their problems in earnest is signaled when they exclude the press and refrain from press comment, save in the most general terms, such as, "we met for so many hours" and "explored our mutual proposals constructively." In public sector bargaining, negotiations are ordinarily excluded from the requirements of conducting public business under the open meeting laws. It is important to be analytically clear as to the reasons negotiations need to be conducted in private.

Negotiators desire to explain the concessions they make and the terms they have achieved directly to their constituents rather than have the press or media initially make that explanation and state the merits, or deficiencies, of the settlement. The negotiators know their own constituents and the political alignments within the group. Moreover, the performance in negotiations and the appraisal of the results of negotiations is a major feature of the political life of an organization that is decisive to the performance of leadership. Since negotiations may treat different members of the group somewhat differently, the leadership desires to deal with these differences directly rather than have the media or press present an initial view.

The injection of the press into negotiations would make it even more difficult for the principal negotiator, or the committee, to change positions. The press reports would encourage those opposed to generate hostility as the negotiations proceeded, before the settlement can be considered as a whole. Moreover, as has been noted, much of negotiations is contingent upon overall agreement, so that initial proposals and counterproposals may not even appear in the final settlement.

The proclivity of the press and media to highlight particular items or give a special cast to events does not appear to serve well the success of negotiations in process, particularly when an agreement is subject to a ratification procedure. The public report of the settlement, with any desired editorial comment after the fact, does not affect the outcome.

I. *An Essential Gap Filler*

The negotiation process, ending in an agreement, typically needs to provide for some procedure to administer or to interpret the terms of the settlement. It is literally impossible to provide for all details, circumstances or contingencies. Sometimes minor gaps are deliberately left in an agreement since a full understanding cannot be achieved, leaving the resolution to a future process of administration or adjudication. Some questions can only be resolved in the light of future developments. Specialists, or those subordinately involved in particular operations, may be more appropriate to resolve the application questions than the principals involved in the negotiations. The long hours of tiring negotiations may overlook a problem, requiring a subsequent procedure to resolve it.

In many instances the procedures for interpretation or administration may simply constitute a reconvening of the negotiating committees or a subgroup. In other situations the procedures may involve a separate group, including the possibility of resorting to arbitration on a question of the meaning or application of the original agreement. The parties may also agree on voluntary arbitration after a period of future negotiations over the issues raised subsequent to the agreement.

In a continuing relationship the process of interpretation and administration of any agreement develops a substantial body of cases, questions and answers, issues, interpretations and applications that come to constitute, with the original negotiated agreement, a complex and expanding body of common understandings. The terms of those understandings may involve different levels of the organizations' parties to the original agreement, from the top level to the lowest operating level in each. These processes provide the "flesh and blood" of the interaction of the organizations, beyond the "bare bones" of the formal agreement. In a sense, the negotiations process and the administrative process create a complex interrelation of the organizations, on a day-to-day basis, and not merely the written words of the formal agreement or protocol.

J. *The Personality Factor*

There is at least one facet of the negotiations process about which it is most difficult to generalize in principle. This facet relates to the importance of the personal relationships among the principal negotiators. Agreements are made not merely among organizations but also among individuals acting on behalf of these organizations. Some individuals in these settings get along well and some do not. This factor of personality, experience, skill, chemistry, attitude, demeanor, as well as status in the organization, does not tend to make much difference in the agreement-making process in some situations, while in others it matters very much. It is not unusual in negotiations for the chief negotiator of each side, sometimes with an aide, to meet to talk "off-the-record" about procedures, timing or substance, or to "try on for size" next moves or proposed settlements, and even to compare notes on constituencies. Therefore, these personal relationships may be pivotal. Even with respect to entirely professional negotiators, the factor of personality influence is not inconsequential in many cases.

While it may not be possible to adjudge its quantitative impact, a careful observer of any negotiations or a mediator will want to appraise and take into account the personality and the interaction of the principal negotiators. The reference to this factor may not be analytically neat, but it does reflect a principle of practical import in many instances.

In summary, the framework developed to elucidate negotiations among continuing organizations that expect to continue to relate to each other involves the following propositions:

1. It takes an agreement within each side to reach an agreement across the table; in two-party negotiations, it takes three agreements to make one.

2. Initial proposals in negotiations are typically large compared to eventual settlements, to serve a variety of purposes. Priorities within each side are often actually established in the course of negotiations.

3. Negotiation is the process of changing positions and making concessions from initial positions while moving toward an agreement.

4. A natural or artificial deadline is an essential feature of most negotiations. Time is not neutral in its effects on the relative position of the negotiators.

5. The end stages of negotiations are delicate, where issues are limited and the distances apart may not be large. Private discussions between one or two key persons on each side are often used to close the gap in the absence of a mediator.

6. Negotiations will be significantly influenced by whether the negotiating table is the final one or merely a step toward further negotiations, in new locales, with other higher-ranked negotiators or with neutrals.

7. Negotiations and serious conflicts may be carried on simultaneously; the purpose of the overt conflict is typically to serve as a tool of agreement-making, although the conflict, and its results, may affect the bargaining objectives and priorities of the negotiators.

8. Agreement-making in negotiations does not flourish in pub-

lic, with press and media coverage. Serious negotiations require that the leaders at the table first communicate directly with their constituents concerning settlement and explain their recommendation, in terms of the internal political life of the organization.

9. An agreement typically reflects the need for a recognized procedure to resolve questions of the meaning and application of the agreement or fill in *lacunae*.

10. The personality of negotiators and how they relate to each other does affect the outcome in some instances.

IV. THE COURSE OF NEGOTIATIONS

There is one further set of ideas that may give insight into interpreting negotiations from the perspective of the observer or the negotiator. Ordinary negotiations tend to follow a pattern or course, and it may be helpful to locate a given session or point in time in the course of this succession of stages or life cycle. A number of stages have been reflected in the above discussion.

The initial stage involves each side presenting its credentials, for whom they speak and their authority to settle or to recommend settlement. Each organization then formally presents its proposals for an agreement, with supporting facts and argument.

The next stage involves each side in asking questions about the proposals, seeking to understand how they would operate and in probing the reasons for the proposals and searching for the true priority items for the current negotiations. Factual material may be developed and sidetables or subcommittees may be asked to generate data on particular questions in dispute.

Some effort may next be made to narrow the number of issues or the magnitudes involved. The next stage is likely to involve the attempt to develop a package or alternative packages of proposals for a settlement. This process involves a search for relative priorities and trade-offs. The internal tensions within each side complicate this process.

The endplay stage of negotiations, closing the gap, often involves side-bar and private discussions of principal negotiators, or a mediator if one is involved. Seldom is agreement reached directly at the negotiating table. There is typically considerable emotional release on reaching agreement; there are joys of settlement.

An agreement needs to be reduced to "legal" language, to the extent that has not been accomplished, and typically checked by both counsels. The appropriate ratification and approval processes also need to be accomplished.

Not every day or night at the negotiating table is the same. There is typically a beginning and an end and a sense of flow or a process through stages toward an agreement. While there is often a good deal of backing and hauling, and even starting over again, the negotiators and close observers need a sense of location or stage in the course of the negotiations process.[35]

V. THE ROLE OF MEDIATION

The framework of the negotiation process among continuing organizations, summarized above, provides a setting to consider the questions: What do mediators do to facilitate agreement making? What are the potentials and the limitations of the mediator?

It has often been appropriately observed that there are various types of mediation and mediators; the extent of penetration into the substantive bargaining discourse, as well as the bargaining process, varies a greal deal. Moreover, just as among negotiators, personality factors and status may be significant factors with some mediators. Some mediators may do little more than preside over meetings and maintain a modicum of order, while others may be deeply involved in proposing packages for settlement and in seeking acceptances of these proposals. But whatever the role of a mediator in an individual situation, the concern, as with negotiations, is the analytics of the mediation process.

A. *Controlling the Flow of Information*

The strategic position of the mediator relates fundamentally to the communication flow between the parties, and on occasion, depending on location and time, the flow between the principal negotiators and their larger committees and constituencies. Particularly in mediation in which the parties are separated, and the parties meet separately with the mediator (which is true at the most critical stages of most negotiations with mediation), the control over information flow between the parties is in the hands of the mediator.

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[35] The discussions of negotiations and mediation in this article has significant implications for public policy. The NLRB and the courts have created the concept of "impasse" in negotiations, and public sector agencies in various states have followed their lead. An employer may be free to make unilateral changes in working conditions, withdraw from an association, or take similar action if an "impasse" exists. This is an utterly unsatisfactory and ambiguous standard. The parties may not be able to settle the dispute directly; with one mediator they may but not with another; the dispute may remain one night but be settled in a further week; an "impasse" may be largely in the eye of the beholder. Or, it may be an excuse to destroy the other side. As a mediator, I am unwilling to recognize or to announce a permanent "impasse." For a discussion of the law, see C.J. MORRIS, THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 330-32 (1971).

This is a substantial and significant tool. What the parties know of each other's changing positions, the explanation and rationales for changes, any view as to how far apart the parties may truly be, the status of internal conflicts of view, and critical attitudes and feelings all are within the control of the mediator. An encouraging or dismal picture may be portrayed by the mediator to each party. The way in which this "switch" in the control over information is utilized is the first principle in understanding the function of mediation in negotiations. The parties might have transmitted to each other some of the information available to the mediator were they meeting across the table. But the mediator alone is privy to some information as a consequence of private discussions with each side, due to the confidence and trust with each side.

In the event the parties communicate directly with each other, around the mediator, a signal has been given as to the mediator's limited usefulness, probably restricting the role to housekeeping functions.

B. *Impartial Factfinders*

The mediator function often involves the development of mutually acceptable factual data to provide a setting for the more informed and more dispassionate discussion of particular issues. In some cases the costing of various proposals and the validation of data regarding other settlements or levels of wages and benefits may be significant to settlement. The costing of complex pension plans or health care arrangements may be done with the mediator or with agreed-upon outside experts. It is difficult to exaggerate the importance and effectiveness, as a mediation tool, of working through background factual material with the parties in a dispassionate mode.

C. *Engendering Understanding*

The mediator serves privately as an informal advisor to each side in the delicate art of putting together packages for consideration by the other. This role involves a sensitivity to the internal priorities and constituencies of each party. It also includes a sympathetic interpretation of each side to the other as to its problems and aspirations.

D. *The Neutral Proponent*

The mediator has the opportunity to formulate a distinctive and imaginative package proposal on his own out of an independent and creative perspective. The mediator is free to try on ideas without having to commit to either party as to where the ideas originated. The parties may have so pursued particular solutions of course that they have neglected new or original ideas that might more acceptably resolve their differences. Mediators differ greatly in their willingness to take such initiatives, although the most distinguished in the past generation, such as George Taylor or David L. Cole, were never bashful in this respect if the option appeared to offer an alternative for settlement.

E. *Finalizing Agreement*

The mediator has a special opportunity in the "endgame" of negotiations. When the parties are relatively close to settlement, and they are aware of it, the final steps may be very difficult. Each side may well believe the other should make the final concessions. The dispute may appear particularly intractable at this juncture; each side has made many moves that have hurt and the internal hostility to a further accommodation is likely to be very high. In these circumstances a third party may greatly facilitate agreement. The separate conditional acceptance to the mediator by one side of a proposal does not prejudice the position of that side if there is no agreement. It is not unusual for a mediator to secure the separate acceptance of each side to a "package" of the mediator's design and then to bring the parties together to announce that, even if they do not know it, they have an agreement.

F. *The Importance of Mutual Respect*

A critical factor affecting the role of the mediator is the circumstances by which he or she entered the dispute. In general, the strongest possible position derives from a joint invitation of the parties to the mediator to assist in the resolution of the controversy. The past relationship of the parties with the mediator, if any, is also likely to be a factor. A mediator may have so sought to induce agreement in a previous case as to be unacceptable to either one or both parties in another situation.

G. *Potential Arbitrator*

A mediator may be asked to serve as an arbitrator, with authority to determine a settlement on one or more specified issues. While arbitration is a different proceeding, and bears a different relationship to negotiations than mediation, there is a class of arbitrations which involve the mediator in formally decreeing an agreed-upon settlement which the parties for one reason or another desire to be formally specified as an arbitration award. The arbitration format of a settlement may be more acceptable to certain internal constituencies or external groups.

H. *The Public Perspective*

Finally, some mediators may play a role in settlement of some disputes by asserting a moral authority or position for the public interest that they may seek to represent or to project. This role may be supported by public officials, by the press, or by interests among affected businesses or communities. In some limited circumstances this role may help to induce settlement, although rarely has this factor alone been very effective.

In summary, in the negotiations process among established organizations as analyzed earlier, mediations may play an independent role in achieving settlement. The analytical process of mediation achieves its outcome through the following processes:

1. Control of the communication patterns among the parties and the use of these flows to encourage settlement.
2. The dispassionate development of factual material thought to be relevant to the issues in negotiations.
3. Assisting the parties in developing settlement package proposals.
4. Developing distinctive settlement packages different from those initiated by the parties.
5. Facilitating settlement without prejudicing the position of the parties when further movement is required during the "end game" of negotiations.
6. The role of the mediator is significantly influenced by the circumstances and sponsorship under which the neutral entered the dispute.
7. The mediator may facilitate acceptance of a settlement, on occasion, by issuing an arbitration award.
8. A mediator may, on rare occasion, be in a position to exert a moral authority or reflect a public interest in the resolution of a dispute.

VI. CONCLUSION: THE CASE FOR NEGOTIATIONS IN DISPUTE RESOLUTION

As a means for the resolution of conflict between organizations, negotiations and agreement-making have a variety of advantages compared to litigation, governmental fiat, or warfare to extinction, although there are some agreements that may be unacceptable to the society expressed in its political and legal processes. The significant feature of an agreement is that its parties are committed to live by it rather than to continue conflict and warfare after a decision unacceptable to one side. There is simply no decision so precise or detailed that parties cannot continue to fight about its meaning, application and scope if they choose to do so. There is an important sense in which no decision among groups can genuinely resolve a controversy unless the parties agree to accept it. The likelihood of parties enforcing their own agreement is far greater than their accepting a decision adverse to one party.

Beyond the basic superiority of genuinely settling a controversy, if agreement is achieved, negotiations have the virtue that they may reduce the high costs to the parties of litigation, the time required for a resolution, and the uncertainty of the resolution. Further, the two sides are ordinarily capable of more imaginative solutions to problems than any outsiders, since they presumably know more about their problems and controversies than do others. It is also the case that many of the conflicts among groups are so complex, or groups are so powerful relative to each other, that increasingly issues cannot be decided with a winner and a loser. The negotiations process often discovers a viable form of accommodation not previously evident. Negotiations can be creative and problem-solving, while most litigation tends to be formalistic and sterile.

These observations suggest that an understanding of the general principles of negotiations and some rudimentary skills are an essential feature of the education for managers of public, nonprofit and business organizations alike. The emphasis that is placed in education on an appreciation of markets and governmental processes including litigation, for practitioners and officers alike, needs to be shifted to some degree toward negotiations and agreement-making, since they play a growing role in conflict resolution today, and they are likely to be even more significant in the future of organizations.[36]

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[36] The substance of this article appears in Mr. Dunlop's new volume, J.T. DUNLOP, DISPUTE RESOLUTION, NEGOTIATION AND CONSENSUS BUILDING 3-28 (1984).

POINTS ON A CONTINUUM: DISPUTE RESOLUTION PROCEDURES AND THE ADMINISTRATIVE PROCESS

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June 5, 1986*

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IX
SETTLEMENT TECHNIQUES

Agencies use a variety of techniques that are less structured and less formal than minitrials to encourage the settlement of contested issues. The unifying principle of all the processes is that the parties make the decision themselves through a negotiated agreement. That is, these procedures are unlike arbitration[351] where someone makes a decision and imposes it on the parties.

Need for Structure to Facilitate Settlements

Settlements happen all the time. Most, no doubt, occur by "doing what comes naturally." While successful in resolving many cases, an ad hoc approach does not recognize settlement as a specific process that can result in both more and better settlements.[352] Explicit recognition of their potential by the development of procedures to induce them in appropriate situations[353] and to provide

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345. Id. at 503.

346. Id.

347. Id.

348. Id.

349. Id.

350. Id.

[351] To a very real extent, however, non-binding arbitration is a settlement techniques since the parties return the authority to make the final decision after award.

[352] Testimony of Erica Dolgin of Environmental Protection Agency at ACUS Hearing supra note 49. Ms. Dolgin observed that settlements have a life span -- a beginning, a middle, and an end -- and that the procedures and skills required for each phase may differ.

[353] While it should be unnecessary to point out, but given the enormous attention paid recently to managing dockets and using ADR techniques as a means of reducing the backlog of trials, it bears emphasizing that not all
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for the participation of those who would be affected can help agencies handle their caseloads and make fully satisfactory decisions with fewer resources than would a more formal process. It is, therefore, helpful to establish procedures to enhance the settlement process. Moreover, settlement procedures can help alleviate problems peculiar to the government in settling cases.[354]

As in any bureaucracy, the distance between those on the line and those with decisional authority can be a major inhibition to negotiating a settlement. The employee who is handling a particular matter may lack guidance as to the agency's policies concerning settlement, and hence may be reluctant to engage in discussions simply because he or she is unclear whether the agency has the power to settle[355] or as to what would be acceptable.[356] Or, as a result of the same

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353.(...continued)
cases can or should be settled. The thesis of this paper is that trials are one, but only one, means of making decisions, and that other techniques may be more appropriate in particular circumstances. ADR techniques are a positive means of resolving important issues, not a second best alternative to the "real thing."

Formal decisions become public goods that guide future conduct and provide a means of ensuring that the public welfare is achieved. For example, if someone was the victim of severe discrimination, the public may demand a full vindication of the violation of the public's standards, even though the individual may be willing to settle for less. There is, therefore, some public policy against settlement, although its full reach and reason is not always clear.

The result, however, is that agencies and parties should always consider the matter in perspective and recognize that some issues should be resolved in a formal, public manner because they involve issues transcending the immediate parties. See Edwards, Fiss, and Schoenbrod, supra note 66. On the other hand, there seems to be no particular reason for believing a federal judge is the only one able to pronounce justice in such cases and that properly structured and supervised settlements may often do a better job of rectifying the problem.

354. Rosin, EPA Settlements of Administrative Litigation, 12 Ecology L. Q. 363 (1985).

355. Former Attorney General William French Smith observed,

> government lawyers sometimes are reluctant to use alternative means of dispute resolution because it is not clear whether Congress has authorized such means. Where Congress has, it still may be unclear who in the agency has power to approve their use or how an agency pays for the nonjudicial forum.

Smith, Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government, 1984 Mo. J. of Dis. Res. 9, 21.

356. Richard Robinson, Director, Legal Enforcement Policy Division, Environmental Protection Agency, testified at the ACUS Hearings that settlement techniques are not used frequently because there are too many layers involved in getting permission to use a new approach and, even if granted, the official
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phenomenon, a proposed settlement may be subjected to multiple layers of review within the agency.[357] In that case, those with whom the agency is negotiating may be reluctant to be forthcoming since the tentative agreement may be upset as it wends its way through the agency. People negotiate to reach a binding resolution of the controversy. Hence, if the agreement that was crafted after days of pressing discussions does not have a fairly good chance of being accepted, parties have a significantly lessened incentive to bargain.

These problems with settlement can be addressed by providing those who would normally negotiate with the public with guidelines as to the agency's policies concerning settlements.[358] Another means of addressing similar problems is for the agency to make lines of authority clear and provide a means for involving policy-level officials in the decisions as they mature, so that once the agreement is struck there is a reasonable likelihood that it will be upheld.

Another inhibition to settlements -- one certainly **not** limited to government -- is that the parties become overly convinced of the strength of their respective cases. Since each believes he or she has a winner, and hence a high BATNA, they also see little to be gained in settling, unless of course the other side sees the light and capitulates. That is not conducive to settlement. Thus, another aid in the settlement process is to provide some sort of "reality check" on all parties. This is some means of helping a party assess the strength of its case in a relatively honest, straight forward way so that they can put its settlement potential into perspective. The minitrial, for example, is designed to use a neutral advisor who will render an informal, non-binding opinion should the executives fail to negotiate an agreement.[359]

Yet another problem facing government officials in settling cases is debilitating second guessing.[360] Direct negotiation among those affected customarily

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356.(...continued)
is likely to feel he or she will not receive enough credit for using a new approach. Thus, it is easier and safer to stick with traditional litigation. Indeed the government has never used ADR in an enforcement case.

[357] See discussion supra at note 272.

[358] Testimony of Kay McMurray, Director, Federal Mediation and Conciliation Service, at ACUS Hearings, supra note 49.

The Attorney General recently issued guidelines to executive branch agencies concerning settlements. It cautions agencies against yielding future discretion in settlements and provides examples of the types of settlements the Department of Justice will oppose. While perhaps negative in tone, it does provide agencies with guidance they can take into account when initiating settlement discussions. It is far better to know of the limitations at the early stages of negotiation than having a fully developed tentative agreement knocked down.

[359] See discussion supra at note 33.

[360] Those who manage the government's litigation may also be reluctant to use informal dispute resolution processes because of a fear that they will be

(continued...)

relies on the parties' self interest for its integrity; indeed, the ability of those affected to actually make the decision is one of the most attractive aspects of direct negotiations. Thus, whether or not the agreement is a "good deal" for any one party can be judged by comparing it to that party's goals and what might have occurred if some other process for reaching a decision were followed. The difficulty with using direct negotiations when the government is a party is that the government's own goals may sometimes be unclear. Thus, for example, it may not be clear in the abstract whether a settlement was wise under the circumstances because the government's case was weak, or the official wanted to achieve some other end,[361] or whether the settlement inexplicably gave too much away. The potential for second guessing an official can have a debilitating effect on negotiations in some controversial areas. In that case, it may be that the agency would want to establish a panel of senior officials or a group of neutral advisers,[362] publish the settlement in the Federal Register for comment,[363] or some other means to ensure the integrity of the decision and to curtail pernicious second guessing.

Overview of Techniques[364]

The Environmental Protection Agency drafted, but has not published rules to encourage the negotiation of test rules under the Toxic Substances Control Act by providing procedures leading to a "consent agreement" that will have the effect of an EPA rule.[365] The proposal provides "EPA intends to use enforceable consent agreements to accomplish testing where a consensus exists among EPA, affected manufacturers and/or processors, and interested members of the public concerning

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360.(...continued)
criticized. For certain issues, such as public health and safety, the perception remains with some that private, informal hearings are inadequate, and that public officials who allow such hearings may be abusing their power.

Smith, supra note 355, at 21.

[361] There is always the possibility that someone will attack a settlement as motivated by the government official's seeking beneficial employment or otherwise currying the favor of the one with whom he or she is settling.

[362] See, Railway Labor Act, § 2, Ninth; Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943).

[363] The Department of Justice and the Federal Trade Commission publish notices concerning proposed mergers.

In addition to providing information for the agency's consideration, the publication can also help diminish allegations of backroom deals since the world at large will know that the decision is being made and what its contours are.

[364] See Appendix I for a survey of settlement techniques used by administrative agencies.

[365] Draft of August 7, 1985 of a notice of proposed rulemaking.

the need for and scope of testing."[366] Procedures have also been recommended for using negotiation to resolve complex Superfund matters.[367] EPA has issued guidelines for settling enforcement actions.[368]

The Federal Energy Regulatory Commission uses as "settlement judge" to help the parties settle a case.[369] The Chief Judge has the authority to designate an ALJ who is not assigned to a case to meet with the parties in an effort to clarify and narrow the issue and to see if they can settle the matter. The settlement judge does not have the authority to impose a decision, and because the judge is not the one who will try the case, the parties are likely to feel freer to be more direct and open in attempting to reconcile their differences. One judge indicated that he was able to review the file and provide a fairly accurate appraisal of the case for certain types of matters, and that had a salutary effect on the parties by putting their case into perspective. To an extent, the settlement judge acts a bit like a mediator and a bit like the neutral adviser in a minitrial by giving his reaction to the case.

Agencies have also established a number of explicit mediation programs. The Secretary of Commerce mediates disputes under the Coastal Zone Management Act between a federal agency and the affected costal zone state.[370] The Office of Ocean and Coastal Resources Management mediates several disputes per year between state agencies and federally licensed activities. Complaints over age discrimination are mediated by the Federal Mediation and Conciliation Service,[371] and the Equal Employment Opportunity Commission seeks to reconcile differences over unlawful employment practices.[372] The Grant Appeals Board of the Department of Health and Human Services provides a "two track approach," one of which is mediation; this process is the subject of a separate, comprehensive study by the Administrative Conference.

The criteria for determining whether an issue is likely to be resolved through negotiation were developed in ACUS Recommendation 82-4.[373] While the recommendation itself focused solely on the prospects for negotiating regulations, the criteria are applicable to issues of public policy generally. Briefly stated, the criteria for deciding when a matter would lend itself to a negotiated solution are:[374]

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[366] Id.

[367] ACUS Rec. 84-4; Anderson, Negotiation and Informal Agency Action: The Case of Superfund, 1985 Duke L. J. 261 (1985).

[368] See, e.g., 50 Fed. Reg. 5034 (1985).

[369] Appendix I.

[370] Appendix I.

[371] For a discussion of FMCS's non-labor activities generally, see Barrett, The FMCS Contribution to Non-labor Dispute Resolution, Monthly Labor Review 31 (August 1985).

[372] 29 CFR § 1601.24.

[373] Harter, Negotiating Regulations, supra note 1, Perritt, Negotiated Rulemaking in Practice, 5 J. Pol. Ana. & Mgt. 482 (1986).

- The number of interests that must participate in the discussions at any one time is limited to approximately 15-25; others can be accommodated by means of "teams" or caucuses".

- Each interest is sufficiently organized that individuals can be selected to represent it during negotiations, or several individuals together can span the range of interests.

- The issues are mature and ripe for decision; that is, they are sufficiently crystallized that the parties can focus on them directly.

- There is a realistic deadline; this may be an agency commitment to move forward on its own if sufficient progress has not been made in the negotiations.

- No party will have to compromise an issue fundamental to its very existence.

- The outcome is genuinely in doubt, in that no party can achieve its will without incurring an unacceptable sanction from some other party; thus, the parties have reached a stalemate or an impasse.

- The parties will commit themselves to negotiating in good faith (which is not to say that they have to agree to yield whatever other tools they have at their disposal to achieve their ends).

Many of these provisions have direct applicability to deciding whether it would be appropriate to settle a pending matter.

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374. Harter, Regulatory Negotiation: An Overview, Dispute Resolution Forum, (Jan. 1986) at 4. See also, Cormick, The "Theory" and Practice of Environmental Mediation, 2 Envtl Prof. 24 (1980); Susskind & Weinstein, Toward a Theory of Environmental Dispute Resolution, 9 B.C. Envtl Aff. L Rev. 311 (1980); Raiffa, The Art and Science of Negotiation (1982).

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ESSAY

FOR AND AGAINST SETTLEMENT: USES AND ABUSES OF THE MANDATORY SETTLEMENT CONFERENCE

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INTRODUCTION

One of the motivating impulses behind the alternative dispute resolution movement is the notion that dispute resolution outside of full adjudication is a good thing.[1] Because dispute resolution is considered a good thing, many judicial administrators and rule drafters have reasoned[2] that the process of settlement, compromise,[3] and alternative dispute resolution should be made mandatory. At the same time, a dispute about the value of dispute resolution is taking place in the law reviews and judicial administration journals. Several articulate and sensible critics have asked us to consider what we gain and lose when we divert cases away from the formal adjudication system.[4] My difficulty with this debate is that both sides make unspecified assumptions about the empirical reality of both the formal adjudicatory system and the alternative dispute resolution mechanisms. In addition, they misinterpret the purposes of each of several dispute resolution devices and assume that they are applicable to all cases. In an attempt to "mediate" this dispute, this Essay explores the theories developed by those for and against settlement, particularly in the mandatory settlement conference context.[5] It is here that commentators make their most vigorous arguments about the advantages of settlement. Whether and when settlement is a good thing is one question; whether settlement conferences should be mandatory is another. On the assumption that many courts will continue to require settlement conferences, I will take up yet a third question: how mandatory settlement conferences can be conducted to maximize their usefulness without seriously threatening the appropriate role of judges in formal adjudication.

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[1] *See* Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111, 112–13 (1976). Marc Galanter has noted that these are not separate processes but part of one larger process—"litigotiation"—in which the boundaries between pure adjudication and negotiation are blurred. Galanter, ". . . *A Settlement Judge, Not a Trial Judge:" Judicial Mediation in the United States*, 12 J.L. & Soc'y 1 (1985).

[2] *See* Fed. R. Civ. P. 16; Fisher, *Judicial Mediation: How It Works Through Pre-Trial Conference*, 10 U. Chi. L. Rev. 453 (1943); *see also* Title, *The Lawyer's Role in Settlement Conferences*, 67 A.B.A. J. 592 (1981).

[3] "Compromise" is the key word in both bibliographic sources and in the descriptions of what settlement conferences are supposed to encourage. Compromise is a problematic term, connoting the necessity for both parties to give something up and reach an agreement "in the middle." Settlements do not necessarily result in compromise, and the settlement officer who begins by pushing

I. THE ISSUES: DISPUTES ABOUT DISPUTE RESOLUTION

One of the most fundamental disputes about nonadjudicatory dispute resolution concerns the values it is intended to promote. Some commentators contrast the quantitative, efficiency, process axis to the qualitative, justice, substance axis. Some extol mandatory settlement conferences, arbitra-

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for compromise has already severely limited what may be achieved. *See* Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); NOMOS XII, COMPROMISE IN ETHICS, LAW, AND POLITICS (J.R. Pennock & J. Chapman eds. 1979).

[4] Among these critics are Owen Fiss, whose article *Against Settlement* suggested the title of this paper, and Judith Resnik. *See* Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985); Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

[5] I focus here on the mandatory settlement conference because it raises the full gamut of issues addressed by the alternative dispute resolution movement. The conference is a good example of hybrid settlement processes, exposing judges' "formal" roles in an "informal" context.

tion, and mediation programs because they decrease delay[6] of case processing time[7] and promote judicial efficiency. This claim is not supported by the empirical research at this stage.[8] Others assert[9] (and I am affiliated with this school)[10] that the *quality* of dispute resolution is improved when models other than the formal adjudication model are used. Solutions to disputes can be tailored to the parties' polycentric needs[11] and can achieve greater party satisfaction and enforcement reliability[12] because they are not binary, win/lose results. Still others assert that quality solutions are more likely to emerge when the dispute resolution process is not privatized and individualized.[13] This argument is characterized alternatively as the "cool efficiency/warm conciliation,"[14] "quantitative/qualitative," or "managerial/substantive" justifications for nonadjudicative dispute resolution.

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[6] *See, e.g.*, T. CHURCH, A. CARLSON, J. LEE & T. TAN, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1978) [hereinafter cited as T. CHURCH]; R. GILLESPIE, JUDICIAL PRODUCTIVITY AND COURT DELAY (1977); L. SIPES, MANAGING TO REDUCE DELAY (1980); Church, *Civil Case Delay in State Trial Courts*, 4 JUST. SYS. J. 166 (1978); Flanders, *Case Management in Federal Courts: Some Controversies and Some Results*, 4 JUST. SYS. J. 147 (1978); Grossman, Kritzer, Bumiller & Mc Dougal, *Measuring the Pace of Litigation in Federal and State Trial Courts*, 65 JUDICATURE 86 (1981); Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 135 (1978); Ryan, Lipetz, Lustien & Neubauer, *Analyzing Court Delay-Reduction Programs: Why Do Some Succeed?*, 65 JUDICATURE 58 (1981).

[7] J. ADLER, W. FELSTINER, D. HENSLER & M. PETERSON, THE PACE OF LITIGATION (1982); Church, *The "Old and the New" Conventional Wisdom of Court Delay*, 7 JUST. SYS. J. 395 (1982); Luskin, *Building a Theory of Case Processing Time*, 62 JUDICATURE 115, 116 (1978).

[8] T. CHURCH, *supra* note 6; S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN THE UNITED STATES DISTRICT COURTS (1977); M. ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964); *see infra* notes 44–59.

[9] *See* McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985) (a response to Fiss, which he attempts to rebut in Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985)).

[10] *See* Menkel-Meadow, *supra* note 3; Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. RESEARCH J. 905; Menkel-Meadow, *The Transformation of Disputes By Lawyers: What the Dispute Paradigm Does and Doesn't Tell Us*, 2 MO. J. DISPUTE RESOLUTION (forthcoming 1985).

[11] A polycentric dispute is one in which the issues are many, rather than one, and the disputants see their differences as implicating more than one aspect of their relationship. *See* Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976); Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 315–18 (1971).

[12] *See* McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11 (1984); McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981).

[13] *See* Abel, *The Contradictions of Informal Justice*, in THE POLITICS OF INFORMAL JUSTICE 267 (R. Abel ed. 1982); *see also* Fiss, *Against Settlement*, *supra* note 4; Resnik, *supra* note 4.

A second dispute concerns the appropriate role of judges when they become involved in alternative dispute resolution or settlement conferences. The judges themselves characterize this issue as whether they should be "active" or "passive."[15] Academics debate whether judges should be "managers" or "adjudicators."[16]

A third dispute falls on the micro-macro axis of analysis. Is the appropriate unit of analysis the particular or individual disputes that are resolved and with which the parties and lawyers are satisfied or should the unit of analysis be the larger system as measured by judicial management statistics or by the quality of precedents produced?[17] Owen Fiss has recently suggested that if too many cases are diverted from the courtroom into settlement, appellate judges will have an insufficient number[18] and quality of cases from which to make the law.[19] Fiss's prediction, if true, could have grave implications for the legitimacy of the entire legal system.

The three disputes outlined above raise issues that should affect significantly our assessment of the strengths and weaknesses of any dispute resolution device. In order to evaluate the arguments advanced in these disputes, we must explore the underlying values and the empirical claims made in support of these arguments.

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[14] *See* M. GALANTER, THE EMERGENCE OF THE JUDGE AS A MEDIATOR IN CIVIL CASES (1984).

[15] *See* F. LACEY, THE JUDGE'S ROLE IN THE SETTLEMENT OF CIVIL SUITS (1977); H. WILL, R. MERHIGE & A. RUBIN, THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS (1983); Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility,* 53 F.R.D. 129 (1971); Peckham, *The Federal Judge As Case Manager: The New Role in Guiding A Case From Filing to Disposition,* 69 CALIF. L. REV. 770 (1981).

[16] *See* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1296–98 (1976); Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation,* 93 HARV. L. REV. 465 (1980); Galanter, *supra* note 1; Resnik, *supra* note 4, at 380–82. See the other articles in this issue for some of the difficulties judges have in their "simple" role of adjudication. Schlag, *Rules and Standards,* 33 UCLA L. REV. 379 (1985); Wilson, *The Morality of Formalism,* 33 UCLA L. REV. 431 (1985).

[17] *See* Newman, *Rethinking Fairness: Perspectives on the Litigation Process,* 94 YALE L.J. 1643 (1985).

[18] Concern for an "insufficient number of cases" for quality rule making runs counter to the more common argument that large caseloads make it difficult for judges to devote the proper time and care to those cases that require serious deliberation and opinion writing.

[19] Fiss, *supra* note 4, at 1087–88. However, there is no empirical evidence that settlement rates have changed in response to increased settlement conference activity. Settlement rates of about 90% are remarkably constant in civil litigation, criminal cases, and family cases. *See* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious Society,* 31 UCLA L. REV. 4 (1984).

There are, as I see it, three value claims. First, there is the efficient-justice claim: Full adjudicatory trials are too long, and there could be too many of them to permit expeditious justice. Ultimately, failure to provide "speedy and inexpensive justice"[20] can become a substantive justice problem. Thus, proponents of mandatory settlement conferences, court-annexed arbitration, and mediation[21] argue that more efficient justice is better justice.

Second, there is the substantive justice claim: The principal function of our legal system is to provide fair and just results to the individual disputants and to society. These results are dependent on rules, generated from other people's disputes, that help define appropriate behavior. Thus, in considering any dispute resolution device we should ask if this process is the most likely to produce a just result for the parties and/or the best result for the future guidance of society. (The answer to this compound question is sometimes different for each of its parts. This contributes to the difficulty of assessing whether settlement is appropriate.)[22]

Third, there is a claim I will call a substantive process claim, made most recently by Judith Resnik.[23] Proponents of substantive process argue that whether a process is public or private (subject to accountability), coercive or voluntary, reasoned or rationalized, matters a great deal, both for the substantive justice achieved and for the legitimacy of the entire process as viewed by those inside of the dispute and by those outside. A corollary substantive process claim, with a focus different from the focus of the claim asserted by Professor Resnik, is that the quality of the process (for example, the "warmer" modes of dispute processing[24] such as conciliation and mediation which give greater involvement to the parties and permit greater flexibility in solution) serves important human values different from the value of a quality substantive outcome.

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[20] *See* FED. R. CIV. P. 1; *see also* Fox, *supra* note 15, at 131.

[21] *See* D. HENSLER, A. LIPSON & E. ROLPH, JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR (1981); K. SHUART, THE WAYNE COUNTY MEDIATION PROGRAM IN THE EASTERN DISTRICT OF MICHIGAN (1984); K. TEGLAND, MEDIATION IN THE WESTERN DISTRICT OF WASHINGTON (1984); *see also* Levin, *Court-Annexed Arbitration*, 16 U. MICH. J.L. REF. 537 (1983).

[22] I associate much, though not all, of Owen Fiss' argument with the second part of this claim; in other words, Fiss seems more concerned with "societal" justice and precedential authority than with the justice offered the individual disputants.

[23] *See* Resnik, *supra* note 4.

These three value claims are not as distinct as they may appear: All assume that the process chosen affects the outcome and the outcome desired affects the choice of process. To complicate matters further, as reviewed below, there are differences of opinion as to how effective particular dispute resolution forms are in advancing these values.

II. THE SETTLEMENT CONFERENCE: A VERY BRIEF HISTORY

The origins of the modern court-initiated settlement conference can probably be traced to local courts' efforts to apply Scandinavian conciliation techniques to local cases in the hope that community norms could be brought to bear to help resolve disputes. Several municipal courts in the United States began utilizing both voluntary and court-structured conciliation in the early twentieth century.[25] From what we know of this early history, the primary impulse behind these efforts seems to have been related to substantive process—producing harmony among the parties and resolving disputes with communitarian values that the court assumed were shared by the disputants. At some point in the 1920's efficiency concerns became a part of the rhetoric surrounding settlement. Judicial reformers spoke of conciliation as a method of curing court delay.[26] In the late 1920's the judges of Wayne County Circuit Court organized a "conciliation" docket to help manage what was perceived as a highly congested court docket. The conciliation process was originally voluntary and informal, but was eventually made mandatory.[27] Similar conciliation dockets were established in city courts in Cleveland, Milwaukee, Boston, and New Jersey.[28] Conciliation or settlement methods were largely dependent on the practices and personalities of particular judges and on an informal transmission and socialization process.[29] As is so often the case in legal reform, the debates of today reflect the two different past justifications of conciliation: Substantive process values and efficient delay reduction.

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[24] *See* Smith, *A Warmer Way of Disputing: Mediation and Conciliation,* 26 AM. J. COMP. L. 205 (1978). In the context of this Essay, warmer means more direct, and more "caring" forms of dispute resolution than adjudication—i.e., more direct party involvement.

[25] P. EBENER, COURT EFFORTS TO REDUCE PRETRIAL DELAY 68–70 (1981); M. GALANTER, *supra* note 14.

[26] M. GALANTER, *supra* note 14, at 3–4 (quoting Judge Lauer of the Municipal Court of New York, who discussed both conciliation and delay reduction motivations).

A parallel, but largely separate, move to facilitate judicial administration was the development of the pretrial conference to streamline trials. Pretrial conferences facilitated the specification of issues, evidence, and rulings on preliminary motions. This procedure, largely derived from English and Scottish practices of the early nineteenth century that provided for oral presentation of preliminary matters in open court,[30] became part of federal practice in 1938 with the promulgation of Rule 16 of the Federal Rules of Civil Procedure. During the drafting of the rule and its first applications, disputes developed about the relationship of the pretrial procedures to settlement, raising the question of appropriate judicial role.[31] Although the rule, as originally drafted, explicitly excluded the use of the pretrial conference for settlement purposes, some local rules and individual judges encouraged settlement discussions with some form of judicial intervention.[32] As judges and academics argued about the appropriateness of judicial involvement in settlement discussions, distinguishing between jury and nonjury cases, or magistrate and judge-managed settlement conferences,[33] pressures from the absolutely increasing numbers of cases[34] gave rise to proposals for rule reform. As Arthur Miller, one of the drafters of new Rule 16, has indicated, the rule is intended to encourage judges to put more time into the management of the "front-end" of cases and explicitly to encourage, if not require, judicial involvement in settlement discussions at the two pretrial stages (preliminary, following filing of the complaint, and final, immediately preceding trial).[35] The question at the heart of the debate about the role of settlement in pretrial conferences under Rule 16 is whether cases and settlement should be initiated and controlled by attorneys (or parties) or by judges.[36] This issue involves fundamental conceptions of our adversary system as distinguished from more judicially activated inquisitorial systems.[37]

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[27] Fox, *supra* note 15, at 133.

[28] *See* P. Ebener, *supra* note 25; M. Galanter, *supra* note 14; Fox, *supra* note 15.

[29] Fox, *supra* note 15, at 133.

[30] *Id.* n.5.

[31] M. Galanter, *supra* note 14; Pollack, *Pre-Trial Conferences—Eighth Circuit Judicial Conference*, 50 F.R.D. 427, 451–67 (1970); Tober, *The Settlement Conference*, 15 Trial L.Q. 42 (1980).

[32] M. Galanter, *supra* note 14, at 5.

[33] *See Annual Judicial Conference, Second Judicial Circuit of the United States*, 101 F.R.D. 161, 221 (1983) [hereinafter cited as *Second Circuit Judicial Conference*]; Pollack, *supra* note 31; Sunderland, *Theory and Practice of Pre-Trial Procedure*, 21 J. Am. Judicature Soc'y 125 (1937).

As the Rule 16 controversy[38] continues, another recent development promises to influence greatly the debate about settlement conferences. Federal Rule 68[39] and state equivalents that tax the failure to reach settlement by imposing penalties for failure to accept "reasonable settlements" increase the burden of "doing justice" by presupposing sufficient opportunities for settlement offers to be made and discussed.

Finally, the magistrates in the federal system[40] provide another class of judicial personnel to conduct settlement conferences. In some cases, their presence moots the debate about judicial role by creating a set of "settlers or managers" distinct from the set of "adjudicators and decision-makers."[41]

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[34] *See generally* 1980 Director Ad. Off. U.S. Cts. Ann. Rep. I use the term "absolutely increasing" to differentiate the question of numbers of lawsuits from whether we are in fact more litigious. *See* Galanter, *supra* note 19, at 3.

[35] *Second Circuit Judicial Conference*, *supra* note 33, at 199.

[36] Connolly, *Why We Do Need Managerial Judges*, Judges' J., Fall 1984, at 34.

[37] *See* M. Schwartz, Lawyers and the Legal Profession ch. 1 (2d ed. 1985).

[38] The local rules are frequently even more coercive. *See* Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. (forthcoming 1986).

[39] Proposed Fed. R. Civ. P. 68, 98 F.R.D. 337, 361–63 (1983).

[40] *See* Federal Magistrates Act. 28 U.S.C. §§ 631–639 (1982); *see also* C. Seron, The Roles of Magistrates: Nine Case Studies (1985); Seron, *The Professionalization of Parajudges: Findings from a Study of U.S. Magistrates*, 70 Judicature (forthcoming 1986); Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 Yale L.J. 1023 (1979).

[41] This is not as neat as it appears. In some courts magistrates are used as judges to hear trials, if the parties agree, in order to reduce dockets. In other

As the debate about federal practice continues, many state courts have already made settlement conferences mandatory. Evaluation studies have attempted to assess their impact.[42] Federal courts, state courts, and smaller local dispute resolution units have provided a variety of other forms for more rapid processing and better dispute processing. Among these are arbitration, mediation (both mandatory and voluntary), and such innovations as the minitrial and the summary jury trial.[43]

III. THE EVIDENCE ON SETTLEMENT CONFERENCES: WHAT DO THE DATA DEMONSTRATE?

Proponents of the settlement conference point to its ability to dispose of cases efficiently, decreasing the delay of case resolution and increasing the likelihood of achieving settlements.

The first systematic study of the pretrial conference was undertaken by Maurice Rosenberg on mandatory conference, voluntary conference, and nonconference cases in New Jersey.[44] That study reported findings, as yet uncontradicted, that mandatory pretrial conferences improved the quality of trial proceedings, but actually reduced the efficiency of the court by consuming judges' time in handling conferences, rather than in trying cases. Plaintiff "victories" were as frequent (all cases were personal injury cases) in mandatory conference cases as in other cases, though pretried cases were likely to result in higher recoveries. Most

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courts magistrates perform other functions including acting as settlement officers. Roger Fisher has suggested that some lawyers should specialize in negotiation, separate from litigation. Fisher, *What About Negotiation as a Specialty?*, 69 A.B.A. J. 1221 (1983). The same suggestion could be made with respect to judges and magistrates.

[42] *See, e.g.*, P. EBENER, *supra* note 25; Aldisert, *A Metropolitan Court Conquers Its Backlog*, 51 JUDICATURE 247 (1968); Title, *supra* note 2.

[43] *See* E. GREEN, THE MINI-TRIAL HANDBOOK (1982); Green, Marks & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 LOY. L.A.L. REV. 493 (1978); Green, *"Getting Out of Court"—Private Resolution of Civil Disputes*, 28 B.B.J. 11 (1984); *see also* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION (1985).

[44] M. ROSENBERG, *supra* note 8. Rosenberg's study involves three classifications of personal injury cases in New Jersey in 1959–60. Originally designed as a "pure" experiment between mandatorily pretried and nonpretried cases, a third sample was created when the Supreme Court of New Jersey relaxed the experiment by instituting a category of permissive pretrials available to lawyers on request. Thus, there were cases in mandatory pretrial, voluntary pretrial, and nonpretrial in the completed study. *Id.* at 19.

significantly, cases submitted to mandatory pretrial conferences were no more likely to result in settlements than those that were not. Settlement rates were fairly uniform across all three types of cases studied.[45] In addition to quantitative analysis of the data collected, the Rosenberg study also consisted of interviews with and observations of judges with a variety of views on the judicial role in settlement conferences. Some judges participated as passive, neutral referees of the dispute; others were actively engaged in case management (i.e., issue clarification); still others saw settlement as one of their most useful functions. One of the most interesting and seldom noted implications of the Rosenberg study is that if parties achieve settlement with equal frequency in mandatory, voluntary, and nonconference cases, judicial settlement management may indeed be an inefficient use of judicial time. More sophisticated study is necessary for us to determine whether cases in particular substantive areas are more likely to settle with judicial intervention than without, or whether settlements "improve" case resolution from a substantive justice perspective, before we can conclude that the mandatory judicial settlement conference is inefficient.

Slightly more recent data do not support convincingly the efficiency argument. The Federal Judicial Center's study of six district courts revealed that courts with the greatest settlement activity had the slowest rate of case terminations, or conversely, the "faster" courts in terms of dispositional speed were those that minimized judicial involvement in settlement.[46] There are some data to support the proposition that case management may reduce the time required for disposition, but these findings concern nonsettlement intervention devices, such as scheduling, discovery management, and motion disposition.[47] Studies of state court pretrial management programs have uncovered similar findings.[48]

Part of the difficulty in assessing the effectiveness of settlement conference activity stems from serious methodological and definitional problems. As Mary Lee Luskin has argued, we cannot assess what is a delayed process until we have a better theoretical and empirical sense of what constitutes "normal" or "optimal" case processing.[49] More puzzling for the evaluation scientist are questions of variation in the time required for the disposition of cases of different types, (should antitrust cases take more or less time than constitutional cases?), in jurisdiction (what should be measured—case processing by court unit or by individual case?), and in cause (showing direct linkages between particular court innovations and processing time reductions is difficult in nonexperimental conditions in which frequently more than one delay reduction device may be in place simultaneously). As any student of elementary statistics knows, correlation is not causation. Association of various factors with reduced delay may demonstrate simply that some unmeasured condition encourages the existence or interaction of other factors. In the language of many scholars of judicial administration the "local legal culture"[50] (vague as that term may be) may make it easier for judges to confer with lawyers to attempt to settle a case, while simultaneously producing a climate conducive to relatively contest-free discovery. In a recent study of attorney attitudes toward judicial settlement Wayne Brazil found that lawyers in the Northern District of California were more enthusiastic about judicial intervention in settlement than lawyers in Florida or the Midwest.[51] The likely reason, Brazil posits, is that litigators in the federal courts of northern California are acculturated to judicial intervention in settlement because of the active involvement of judges in mandatory settlement procedures in the state courts of California.[52]

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[45] *Id.* at 45–50.

[46] *See* S. FLANDERS, *supra* note 8; *see also* S. FLANDERS, DISTRICT COURT STUDIES PROJECT INTERIM REPORT (1976).

[47] Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RESEARCH J. 873; L. SIPES, MANAGING TO REDUCE DELAY (1980).

[48] *See* Church, *supra* note 6.

A greater methodological or metamethodological problem arises from the relationship of method to findings. The studies that report legal cultural factors (Church's local discretionary system[53]) rely on anthropological measurement techniques—interviews and informal observations in which rich detail and variation may be observed. More quantitative studies, not surprisingly, report on the achievements of structural factors that lend themselves to easy categorization and bimodal analyses. Indeed, one might argue that the very concern with delay, efficiency, and the pace of litigation is, in part, a product of the assumed ease of measuring such phenomena through the increasingly comprehensive quantitative data collected by the Administrative Office of United States Courts, the Federal Judicial Center, and other court administrators and managers.[54] How much harder it is to debate and measure the quality of justice. Even when attempting to measure quality, we tend to use operationalized measures of justice like "party satisfaction" that are easier to categorize and measure (very pleased, somewhat pleased, not very pleased) than other possible measures (most legitimate, took account of both parties' valued interests).[55]

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[49] Luskin, *supra* note 7.

[50] *See* Church, *supra* note 7.

[51] Brazil, *Settling Civil Cases: What Lawyers Want From Judges*, JUDGES' J., Summer 1984, at 15 [hereinafter cited as Brazil, *What Lawyers Want*]; Brazil, *Settling Civil Cases: Where Attorneys Disagree About Judicial Roles*, JUDGES' J., Summer 1984, at 21; Brazil, *Settling Civil Cases: The Quest For Fairness*, JUDGES' J., Summer 1984, at 33. For a more detailed discussion of Brazil's study, see *infra* notes 109–11 and accompanying text.

[52] This is a chicken and egg problem. Are attitudes different in Northern California because of the state rules or were the state rules possible because Northern California lawyers were amenable to a mandatory settlement culture?

It is no accident that the protagonists of the recent debates about whether settlement conferences and other judicial management devices are reducing delay are professional court administrators[56] and critical academics.[57] On the one hand, Steven Flanders and Paul Connelly argue that managerial control of the case (including nonsettlement functions) shortens case processing time by bringing the parties together and reducing lawyer control of the case.[58] On the other hand, Judith Resnik argues that such devices as the mandatory settlement conference may create greater delays because they force all cases through a settlement process, whether it is appropriate for a particular case or not. This, Resnik argues, takes a great deal of judicial time without necessarily producing a more efficient result or any final result at all.[59] Professional court administrators argue that rule changes can change behavior which in turn will affect rates of settlement and dispositions. Academics and evaluators[60] argue that more complex relationships govern (1) whether rules can or should affect behavior, and (2) the costs of the rules themselves in routinizing increased management (judicial time and paperwork).

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[53] Church, *supra* note 7, at 401–04.

[54] *See* Resnik, *supra* note 4, at 395–99.

[55] *See* Fiss, *Against Settlement*, *supra* note 4; *see also* Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (providing criteria for the evaluation of "quality of justice").

[56] Connelly, *supra* note 36; Flanders, *Commentary: Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984).

[57] *See supra* note 4.

[58] Connelly, *supra* note 36; Flanders, *supra* note 56.

What do we learn from all this? Efficiency and reduction of delay do not necessarily increase with judicial settlement management. Indeed, the available data seem to suggest the opposite. Yet many commentators still perceive mandatory settlement conferences and other judicial and court management devices as good ideas. Why? At least some of the reasons are grounded in the substantive justice and substantive process values associated with dispute resolution.

One study of the role of courts found that 75% of federal judges and 56% of state judges initiate settlement discussions in jury trials.[61] I will explore what judges actually do in settlement conferences below, but it is instructive to note that despite all the academic criticism of the judicial settlement role, lawyers overwhelmingly seem to favor judicial intervention. In a recent study of lawyers from four federal district courts, Wayne Brazil (then law professor, now United States magistrate) found that a "staggering 85 percent of our respondents agree that 'involvement by federal judges in settlement discussion [is] likely to improve significantly the prospects for achieving settlement.' "[62] A majority of these lawyers felt that settlement conferences should be mandatory. A more detailed analysis of the data[63] reveals that most of the respondent lawyers in this study do not see the principal advantage of judicial involvement as efficiency, but as a complex web of qualities that are thought to produce better, and perhaps earlier, settlements. The lawyers valued judicial intervention in settlement proceedings most when it was analytic, active, based on the knowledge of specific facts of the case, rather than superficial formulas or simplistic compromises, and there are explicit suggestions or assessments of particular solutions.[64] Thus, these lawyers believe that there is a role for mandatory settlement conferences in producing particular kinds of settlements. Whether or not it is true that judicial intervention in settlement conferences actually produces a better result is not yet established on an empirical basis. But that lack of knowledge has not inhibited the debate about whether judges[65] should be involved in the settlement process.

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[59] Resnik, *supra* note 4, at 423 n.184; Resnik, *Managerial Judges and Court Delay: The Unproven Assumptions,* JUDGES' J., Winter 1984, at 8.

[60] *See generally* Church, *supra* note 7.

[61] YANKELOVICH, SKELLY & WHITE, INC., STUDY OF THE ROLE OF COURTS 83 (1980).

[62] Brazil, *What Lawyers Want, supra* note 51, at 16.

[63] See *infra* notes 97–117 and accompanying text for a discussion of particular judicial roles and techniques used in settlement conferences.

IV. THE ROLE FOR SETTLEMENT CONFERENCES IN PROVIDING SUBSTANTIVE JUSTICE: WHEN SETTLEMENT?

Those who criticize the role of the judge in settlement functions assume the judge's proper role is purely adjudicative. Owen Fiss has stated starkly: "Courts exist to give meaning to public values, not to resolve disputes."[66] Judith Resnik has argued that judges are required to provide reasoned explanations for their decisions, are supposed to rule without concern for the interests of particular constituencies, are required to act with deliberation, and are to be disinterested and disengaged from the dispute and disputants.[67] Those who criticize the settlement function, I fear, have enshrined the adjudicative function based on an unproven, undemonstrated record of successful performance, just as the efficiency experts have exalted settlement conferences relying on unconvincing statistics. For me, the more fruitful inquiry is to ask under what circumstances adjudication is more appropriate than settlement, or vice-versa.[68] In short, when settlement? To answer this question we must separately examine the alleged functions and purposes of adjudication and settlement.

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[64] *See* Brazil, *What Lawyers Want*, *supra* note 51, at 16.

[65] I have been focusing thus far on judge-managed settlement conferences. See *supra* notes 25–43 and accompanying text for a discussion of the role of magistrates in settlement conferences.

[66] Fiss, *supra* note 55, at 30.

[67] Resnik, *supra* note 4, at 445.

[68] Scholars are now beginning to address themselves to the question of whether it is possible to develop a typology of cases or a framework of variables to specify in advance which cases are appropriate for which dispute resolution devices. *See* Bush, *Dispute Resolution Alternatives and Achieving the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893.

A. *The Functions of Adjudication*

In criticizing the alternative dispute resolution movement, Owen Fiss has eloquently, but incorrectly, I think, argued that settlement is dangerous because it robs us of the essential functions of our legal system that can be provided only by adjudication. Settlement, which Fiss sees as "the civil analogue of plea bargaining" is "a capitulation to the conditions of mass society" in which "justice may not be done."[69] Fiss argues that settlement fails to deal with inequalities of power. The terms of settlement reflect the raw power of the parties in a bilateral exchange that permits no intermediation by a superauthoritative judge, as in adjudication. Fiss suggests that "the guiding presence of the judge . . . can employ a number of measures to lessen the impact of distributional inequalities" such as asking questions, calling his own witnesses, inviting other persons to participate as amici and employing "judgment which aspires to an autonomy from distributional inequalities."[70]

These arguments are problematic, though instructive. First, two unsubstantiated empirical claims are asserted: (1) judges use techniques to balance the equities between parties, and (2) these techniques have the desired effect. Second, assuming arguendo that these assertions are true, the ameliorating techniques could be used in settlements managed by judges through court-sponsored settlement conferences.

In complaining about the ill effects of settlement, Fiss collapses a wide variety of settlement processes (bilateral negotiation, mediation, arbitration, court-sponsored settlement conferences, rent-a-judge[71]) into one general category. He fails to take account of the diversity of settlement structures, each of which may utilize some aspect of adjudication processes. Thus, Fiss is correct to point out the dangers of unequal power, but fails to consider the potential of judges in settlement conferences to serve the express purpose of reducing unfairness when parties have unequal resources.

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[69] Fiss, *Against Settlement, supra* note 4, at 1075.

[70] *Id.* at 1077–78.

[71] *See generally* Coulson, *Private Settlement For the Public Good,* 66 JUDICATURE 7 (1982); Gnaizda, *Secret Justice for the Priveleged Few,* 66 JUDICATURE 6 (1982); Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts,* 94 HARV. L. REV. 1592 (1981).

Striking closer to the core of adjudication, Fiss argues that courts are not designed to be simple dispute resolvers. Their function is to "explicate and give force to the values embodied in authoritative texts"[72] and to provide public guidance about the normative order: "a settlement will thereby deprive a court of the occasion and perhaps even the ability to render an interpretation."[73] According to Fiss this is particularly true in cases in which the issue is not the "neighborhood" dispute romanticized by the proponents of settlement, but an important constitutional or institutional reform issue.[74]

Fiss makes several claims that should be unpacked separately. First, Fiss asserts that the primary adjudicative function of courts makes settlement inappropriate in many, if not most, cases. When an authoritative ruling is necessary, I believe Fiss is right—the courts must adjudicate and provide clear guidance for all: Racial discrimination is wrong; oppressive prison conditions are intolerable in a decently humane society.[75] This tells us something about when mandatory settlement conferences might be inappropriate: when the issue has an impact on the public; or when, even in a "private" dispute, there is a need for authoritative third-party ruling (i.e., when one party seeks vindication or when the force of a court order is necessary to bring about compliance). Even assuming public adjudication is necessary to establish a rule or a basic right, court-guided settlement and management still may be necessary to implement such rulings. A greater difficulty may be determining in advance of litigation or settlement which disputes are "public" or require adjudication and which are "private"[76] or can do without public airing.

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[72] Fiss, *Against Settlement*, *supra* note 4, at 1085.

[73] *Id.*

[74] *See generally* Chayes, *supra* note 16; Eisenberg & Yeazell, *supra* note 16; Resnik, *supra* note 4.

[75] I have previously considered when negotiated settlements may not be appropriate. *See* Menkel-Meadow, *supra* note 3, at 835–36. Some courts have explicitly exempted certain categories of cases, for example constitutional cases, from mandatory settlement conferences.

[76] The distinction between the private and the public is an elusive one. *See* *Symposium: The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982); *see also*

Second, what should be done when the disputants to an important and "public" dispute prefer private resolution and settlement (as in some school desegregation and many employment discrimination suits)? Who should decide when public adjudication is necessary—the parties (which is the principle behind our party-initiating adversary system) or the judge, or a group of legal scholars and critics? Fiss suggests that parties in such situations choose peace, through settlement, over justice, through adjudication. I question whether this perceived dichotomy is accurate. In my view, parties will frequently opt out of adjudication precisely because the limited remedial imagination of courts makes justice less possible in adjudication than in individually tailored settlements.[77]

Finally, Fiss acknowledges a genuine debate about the numbers of cases that may require public, authoritative rulings. Although I do not think most cases are of the "neighborhood dispute" variety, I also do not think most are of the "structural reform" variety. The point may not be how many cases are in either category, but that "the settlement movement must introduce a qualitative perspective, it must speak to these more significant cases."[78] Those who applaud settlement, like those who applaud adjudication, must be more sophisticated about when and how to apply settlement or adjudicative devices.[79]

A more significant point about adjudication embedded here is that, if adjudication is the process by which our rules are fleshed out in their principled and practical way, mandatory settlement may pose a problem. So many cases may be diverted away from the system that we will not have a good or representative sample left for rule making. Adjudi-

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Grady, *Settlement of Government and Private Cases: The Court,* 50 ANTITRUST L.J. 43 (1981) (discussion of judges' duties in considering the public interest when accepting settlements in privately conducted antitrust cases).

[77] *See generally* Menkel-Meadow, *supra* note 3.

[78] Fiss, *Against Settlement*, *supra* note 4, at 1087.

[79] It could be argued that judge involvement in settlement will produce more law or norm-based results than in bilateral negotiations. With a third party "facilitating" settlement in an environment of rule-based decision making, judicially managed settlement conferences may increase the attention paid to law, rather than simple attention paid to nuisance value or other estimates of cases. Seeking a "fair" solution, mediated by a third party could lead to more law-based solutions. Eisenberg, *supra* note 11, at 655–65; Galanter, *supra* note 1, at 19–20.

cation in a common law system may require gradual and rich decision making based on a wide variety of fact situations that test the limits of the rules. This, however, is the need of adjudication for good rule making; it is a policy or constitutive issue on a different level from what is best for each individual case or for the system management problems the efficiency experts pose. Over 90% of all cases (both civil and criminal) are currently settled and taken out of the system and, thus, are unavailable for common law rule making. If Fiss is suggesting that the settlement movement will take particular types of potential rule making cases out of the system, he is asserting an interesting, but at this point speculative, and empirically untested, notion.

Fiss's picture of adjudication poses another issue for settlement—legitimacy and enforcement. At the first level Fiss argues that only after a "full day in court" (rather than a "mini-day" in court) with an airing of the arguments about applicable law and disputed facts will the parties fully accept the legitimacy of the decision. And only the combination of this airing and an authoritative ruling by a third party will encourage the parties to obey and subject them to the contempt power of the court if they do not. In Fiss's words: "Courts do not see a mere bargain between the parties as a sufficient foundation for the exercise of their coercive powers."[80] This statement, if true, would seriously undermine the power of the settlement process. But once again, the statement has not yet been empirically verified. Furthermore, Fiss focuses on an aspect of the adjudication process that is not necessarily absent in settlement conferences. If judges participate in settlement conferences, and if most major cases settle in court or out of court in conferences, the entry of a consent decree or formal settlement agreement in the court's record would alleviate some, though not all, of the legitimacy and enforcement problems. More importantly, Fiss fails to deal with what is perhaps the most effective argument made on behalf of settlements:[81] If the parties make their own agreement they are more likely to abide by it, and it will have greater legitimacy than a solution imposed from without.[82]

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[80] Fiss, *Against Settlement*, *supra* note 4, at 1084.

[81] *See infra* text accompanying notes 91–96.

[82] *See* McEwen & Maiman, *supra* note 12.

Finally, Fiss asserts that adjudication and the adherence to the procedural rules are more likely to assure authoritative consent of the parties (particularly when the parties are groups). Again embedded in this one particular concern is a more general concern. The long history of procedure should tell us something about the value of having specified rules of the game established in advance. Whether it is the rule about consent in a class action or evidence rules that attempt to assure reliability and avoid prejudice, there is a serious danger embedded in the informal and idiosyncratic aspects of the settlement process. I do not think these problems are insurmountable (it may be easier to bring all interested parties into a mediated settlement[83] than into a courtroom), but they are worthy of attention. If settlement conferences become mandatory we must be conscious of the need for flexibility as well as the danger of carelessly tossing aside several hundred years of procedural protections.

Fiss focuses on the process of adjudication, but other critics of settlement focus on the role of the judge as an essential personage in the story of adjudication whose robe will become sullied if settlement is added to the judicial duties. As discussed above, Professor Resnik has argued that judges, as public officials whose function is to judge, must remain neutral, disinterested, and public in their activities in order to fulfill the traditional roles Fiss describes: power equalizers, enforcers, interpreters, and explicators of the law.[84]

It is a nice story—but is it true? On a historical level we know that courts have often done more than adjudicate in the pristine fashion described by Fiss and Resnik. Professors Schwartz, Eisenberg, Yeazell, and Chayes[85] tell us that courts have always managed and administered not only themselves, but also the criminal justice system, probate matters, and other matters as well. Courts have promulgated rules, acting as a superlegislature on occasion.[86]

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[83] *See* L. Bacow & M. Wheeler, Environmental Dispute Resolution (1984).

[84] Resnik, *supra* note 4, at 445.

[85] Schwartz, *The Other Things That Courts Do*, 28 UCLA L. Rev. 438 (1981); Eisenberg & Yeazell, *supra* note 16; Chayes, *supra* note 16.

[86] In some states the supreme courts promulgate the procedural rules for rest of the system and/or the ethical rules that regulate the practice of the profession.

Judges have been asked to mediate or settle important public issues outside the formal structure of adjudication.[87] Contrary to Fiss's restrictive view, courts and the judges who sit in them historically have filled more roles than solely authoritative norm explicators.

For a meaningful appraisal of the adjudication and settlement controversy, we need to know more about the empirical reality of judging. Some of the empirical evidence we have suggests that courts (and legislatures) are not very effective at making or interpreting laws.[88] In addition, Marc Galanter's work suggests that courts may not be particularly good equalizers of disparate resources.[89] Thus, whenever I am confronted with a critic of the settlement movement, I am inclined to ask—settlement compared to what?[90] We should learn from the trenchant criticisms of settlement that it can be problematic and may not be appropriate in all cases. We should seriously address those criticisms. But we should be similarly demanding of what is offered as the alternative to settlement.

B. *The Functions and Purposes of Settlement*

I will not repeat the often stated assertion that settlement is a "docket-clearing" device. We have examined the efficiency argument and found it wanting. What settlement offers is a substantive justice that may be more responsive to the parties' needs than adjudication. Settlement can be particularized to the needs of the parties, it can avoid win/lose, binary results, provide richer remedies than the commodification or monetarization of all claims, and achieve legitimacy through consent. In addition, settlement offers a different substantive process by allowing participation by the parties as well as the lawyers. Settlement fosters a communication process that can be more direct and less stylized than litigation, and affords greater flexibility of procedure and remedy.[91]

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[87] An example is Chief Justice Earl Warren's service on the Kennedy assassination commission.

[88] Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); White, *Contract Law in Modern Commercial Transactions, An Artifact of Twentieth Century Business Life?*, 22 WASHBURN L.J. 1 (1982).

[89] Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

[90] See the growing literature on the feminist critique of mediation in domestic relations disputes that argues that women, with less power in our society traditionally, will be taken advantage of in less formal processes. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, 2 LAW & INEQUALITY 21 (1984); Woods, *Mediation: A Backlash to Women: Progress on Family Law Issues* 19 CLEARINGHOUSE REV. 431 (1985).

But settlement is not all things to all people. Settlements can be coerced, either by the power of the parties, by a strong judge in a settlement conference, or by inexorable trial dates. Settlements can be economically wasteful[92] if the participants fail to consider all of the information bearing on the dispute and prevent thorough investigation and airing of all issues. They can be achieved in illegitimate and private ways. For example, several parties may gang up on another, parties may distort facts, or make incorrect predictions about the probable trial outcome. They can be unfair and unprincipled, based on factors extraneous to the merits. As discussed above, private settlements also can be problematic when there is a need for a clear or authoritative ruling.[93] Significantly, settlements may be disturbing on a systemic or societal level if separate classes of disputants are allocated routinely or by paid choice to one form of dispute resolution.[94]

For me, the central question in this dispute about dispute resolution should not be whether cases should always be settled or always be adjudicated, but rather when and how settlements are most appropriately achieved. I remain agnostic on the issue of whether we can specify in advance which types of disputes are best settled and which are best adjudicated. Like Fiss I fear that tracking in advance will not work[95] or that it will be more expensive to make predictions in some cases than to proceed with litigation. I also remain more skeptical than Professors Green and Bush[96] about the feasibility of establishing criteria for tracking to appropriate dispute resolution mechanism in advance of case processing. What I am certain about is that, if settlements are to be encouraged and if judges are to maintain or increase their involvement in producing settlements, we must confront the weaknesses of the mandatory settlement conference in order to provide the best possible substantive and procedural justice. By so doing, we also will continue to pursue the elusive goal of efficiency.

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[91] These arguments have been made in greater detail in Menkel-Meadow, *supra* note 3.

[92] See the discussion of Pareto optimal settlements in H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 138–39, 158–64 (1982).

[93] The Asbestos Claim Facility will be a good test of whether semi-"private" settlements can effectively deal with important public issues of liability. *See* CENTER FOR PUBLIC RESOURCES, PROCEEDINGS OF ANNUAL MEETING (1984).

[94] This argument applies to both ends of the economic spectrum. At one end, it is argued, those with few economic resources are forced into separate dispute resolution devices like neighborhood justice centers and away from the courts where significant rights have most recently been won. *See* Abel, *supra* note 13. At the other end, wealthy litigants may be able to buy their way out of the formal adjudication system by purchasing judges, *see* sources cited *supra* note 71, or mini-trials, *see* sources cited *supra* note 43.

V. THE FUNCTIONS AND PURPOSES OF THE MANDATORY SETTLEMENT CONFERENCE: THE HOW AND WHY OF SETTLEMENT PRACTICES

As greater numbers of judges and courts use settlement conferences, our information about particular practices increases. Our current sources of data include reports and articles written by judges and settlement officers, training materials written for new judges, some survey data collected by social scientists and court administrators, and descriptive and critical reports by academics. As we review this data, it is useful to think about how the manager of the settlement conference, whether judge or magistrate, views his or her role. What emerges from the data is a variety of role conceptions that parallel the various conceptions of the goals of settlement. For some, efficient case management is the primary role; for others, the primary role is the facilitation of substantive or procedural justice. For others still, the primary role is simple brokering of what would occur anyway in bilateral negotiations. Some judges avoid active settlement activity because they view adjudication as their primary role.

My concern with the settlement management role conception is twofold. First, role conception seems to have a direct effect on the choice of techniques used. In turn, the techniques may have a direct influence on the type of settlement reached. Second, without an open debate about the merits of particular technique choices, we may be unaware of both primary and secondary effects of making settlement conferences mandatory.

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[95] Fiss, *Against Settlement*, *supra* note 4, at 1075, 1087–88.

[96] *See* Green, *supra* note 43; Bush, *supra* note 68.

It is not surprising that the literature describing practices in settlement conferences reflects the full range of attitudes toward the appropriateness of judicial intervention. Those judges least comfortable with intervention in settlement describe the settlement process as a mere "by-product" of the mandatory pretrial conference.[97] Such judges see themselves simply as facilitators of what the lawyers would do anyway, providing a meeting place for lawyers to get together and discuss their cases. In one well-documented case, the judge arranged several days of cocktail parties and country club dining to encourage a meeting of counsel in a complex case.[98] Moving slightly closer to the activist line are those judges who maintain that the best intervention on behalf of settlement is the setting of a firm trial date, thereby expediting discovery, improving estimates of costs and predictions of trial outcomes, and setting firm deadlines for discovery and trial.[99]

At the other extreme are the activist judges who see settlement of cases as one of their principal functions. In one of the more thoughtful judicial analyses of the advantages and disadvantages of judicial intervention, Judge Fox of the federal district court in western Michigan has analyzed both the quantitative efficiency, docket management arguments and the substantive values (results more closely related to the merits of the cases as the parties and their lawyers understand them) arguments in favor of intervention.[100]

A. *The Dangers of Efficiency-Seeking Settlement Techniques*

For those who seek to use the settlement conference as a docket-clearing device, the conference becomes most problematic in terms of the substantive and process values (i.e., *quality* of solution) previously discussed. Judges see their role as simplifying the issues until the major issue separating the parties (usually described as money) is identified and the judge can attempt to "narrow the gap." In one study judges and lawyers were asked to report on judicial settlement activity. Seventy-two percent of the lawyers reported that they participated at least once in settlement conferences in which the judge requested the parties to "split the difference."[101] The same study noted that when local rules require settlement conferences judges tend to be more assertive in their settlement techniques (using several techniques that some of the lawyers considered to be unethical).[102] According to the study, jurisdictions with mandatory settlement conferences took more time in moving cases toward trial. This confirms the findings of earlier studies.[103]

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[97] *See* F. LACEY, *supra* note 15, at 3; Galanter, *supra* note 1.

[98] For a fuller description of judicial settlement activities, see sources cited *supra* note 15; J. RYAN, A. ASHMAN, B. SALES & S. SHANE-DUBOW, AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCES (1980); Kritzer, *The Judge's Role in Pretrial Case Processing: Assessing the Need for Change*, 66 JUDICATURE 28 (1982); Shafroth, *Pre-Trial Techniques of Federal Judges*, 28 J. AM. JUDICATURE SOC'Y 39 (1944). The Federal Judicial Center has been conducting a study of judges' settlement activities.

[99] *See* H. WILL, R. MERHIGE & A. RUBIN, *supra* note 15. While many lawyers report anecdotally that a firm trial date is the best device for settlement, especially when one party has a stake in delay, data seem to suggest otherwise. *See* Galanter, *supra* note 1, at 12–13; Kritzer, *supra* note 98, at 35–36.

[100] *See* Fox, *supra* note 15.

A much touted settlement technique is the use of the "Lloyds of London" formula: The settlement judge asks the parties to assess the probabilities of liability and damages and, if the figures are within reasonable range, to split the difference.[104] The difficulty with such settlement techniques is that they tend to monetarize and compromise all the issues in the case. Although some cases are reducible to monetary issues, an approach to case evaluation on purely monetary grounds may decrease the likelihood of settlement by making fewer issues available for trade-offs.[105] Furthermore, a wider definition of options may make compromise unnecessary. As the recent outpouring of popular and scholarly literature on negotiation illustrates, the greater the number of issues in controversy between the parties, the greater the likelihood of achieving a variety of solutions. Parties may place complementary values on different items.[106] The irony is that settlement managers, who think they are making settlement easier by reducing the issues, may in fact be increasing the likelihood of deadlock by reducing the issues to one. Furthermore, as I have argued at length elsewhere, using money as a proxy for other interests the parties may have, may thwart the possibilities for using party interests for mutual gain.[107]

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[101] Wall & Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge is Not a Bump On a Log*, 6 AM. J. TRIAL ADVOC. 27 (1982); *see also* Schiller & Wall, *Judicial Settlement Techniques*, 5 AM. J. TRIAL ADVOC. 39 (1981).

[102] Wall & Schiller, *supra* note 101, at 37.

[103] *Id.*; *see supra* notes 44-48.

[104] H. WILL, R. MERHIGE & A. RUBIN, *supra* note 15, at 4.

[105] *See* H. RAIFFA, *supra* note 92.

[106] *See generally* R. FISHER & W. URY, GETTING TO YES (1981); H. RAIFFA, *supra*

In addition to foreclosing a number of possible settlements, the efficiency-minded settlement officer seems prone to use coercive techniques such as suggesting a particular result, making threats about taking the case off the docket, directing meetings with clients or parties. Lawyers find these techniques problematic.[108] Thus, the quest for efficiency may in fact be counterproductive.

B. *The Search for Quality Solutions*

Some recent data seem to indicate that greater satisfaction can be achieved with a different settlement management role—the facilitator of good settlements. Brazil's survey of lawyers practicing in four federal districts reveals that lawyers favored intervention techniques that sought to produce the "best result." Lawyers favored such techniques because judges who analyzed the particular facts of the case (as opposed to those who used formulas like "Lloyds of London"), offered explicit suggestions and assessments of the parties' positions, occasionally spoke directly to recalcitrant clients, and expressed views about the unfairness of particular results.[109] Brazil's data are interesting in that they point to variations in the desirability of particular settlement techniques, depending on size of case, case type, defense or plaintiff practice, and other demographic factors.[110]

What emerges from Brazil's data is that lawyers want different things in different cases. Thus, a routinized settlement agenda is not likely to be successful in satisfying their desires. More significantly, the data show that lawyers do not perceive judges' settlement role as significantly different

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note 92; Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 U. KAN. L. REV. 69 (1982); Menkel-Meadow, *supra* note 3.

[107] *See* Menkel-Meadow, *supra* note 3.

[108] *See* Bedlin & Nejelski, *Unsettling Issues About Settling Civil Litigation: Examining "Doomsday Machines, Quick Looks" and Other Modest Proposals*, 68 JUDICATURE 9 (1984); Wall & Schiller, *supra* note 101.

[109] *See* Brazil, *What Lawyers Want*, *supra* note 51.

[110] *See id.*

from their adjudicative role when the judges employ the more favored settlement techniques. In alternative dispute resolution parlance, the lawyers of Brazil's study seek a hybrid of the adjudicator—the "med-arb" (mediator-arbitrator):

> They prefer that judges express opinions, offer suggestions, or analyze situations much more than they value judges asking the attorneys to make a presentation or conduct an analysis. Our respondents consistently give higher effective ratings to settlement conference procedures that revolve around inputs by judges than those that feature exposition by counsel. Thus, the lawyers' assessments of specific techniques reinforce the major theme that what litigators want most from judges in settlement conferences is *an expression of analytical opinion.*[111]

The lawyers wanted help in achieving specific results through analysis and reasoned opinions, not formulaic compromises. Whether judges will deliver such help is another issue. If, as Resnik argues, there is a danger that judges will manipulate results to serve their own ends when the results do not have to be justified in print, we should view with distrust some of the techniques suggested here. But if judges (or magistrates) will serve as Howard Raiffa's "analytic mediators" (i.e., asking questions to explore the parties' interests and attempting to fashion tailor-made solutions from an "objective" outside-of-the-problem position, but with additional information), then judicial and magistrate settlement managers may be providing both better and more efficient (in the Pareto optimal sense) solutions to litigation problems.

Judges who perform these functions are not necessarily mediators, though they are frequently called that by themselves[112] and others.[113] Strictly speaking, a mediator facilitates communication between the parties and helps them to reach their own solution. As a mediator becomes more directly involved in suggesting the substantive solution, his or her role can change and he or she can become an arbitrator or adjudicator. It appears that the role judges and magistrates assume in many settlement conferences is this hybrid form of med-arb. Med-arb uses all the techniques associated with mediation and arbitration—caucusing (meeting with the parties separately), making suggestions to the parties, allowing closed or best-offer bidding, and meeting with principals (clients) who have authority to settle or to reconsider and reconceive the problem. As the med-arb process moves toward arbitration, "settlements" may closely resemble adjudication with rationalized, normative, or law-based solutions.[114]

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[111] *Id.* at 16 (emphasis in original).

[112] *See* Fox, *supra* note 15, at 148.

[113] *See* M. GALANTER, *supra* note 14.

To the extent that settlement procedures are used to achieve substantive outcomes that are better than court-defined remedies, they have implications for how the settlement conference should be conducted and who should conduct it. First, those with knowledge about the larger implications of the litigation—the parties—should be present (this is the principle behind the mini-trial concept with business personnel in attendance) to offer or accept solutions that involve more than simple money settlements. Second, such conferences should be managed by someone other than the trial judge so that interests and considerations that might effect a settlement but would be inadmissible in court will not prejudice a later trial. Some argue for a separate "settlement officer" because the skills required for guiding negotiations are different from those required for trying cases. Third, some cases in which issues should not be traded off should not be subjected to the settlement process at all. For example, in employment discrimination cases, parties should not be asked to accept monetary settlements in lieu of a job for which they are qualified. Finally, a more traditional mediator's role may be more appropriate when the substantive process (i.e., direct communication between the parties) may be more important than the substantive outcome (i.e., employer-employee disputes, some civil rights cases).

CONCLUSION

Several important studies are now available to document the variety of settlement techniques and the frequency of their use.[115] The question remains, with the choice of so many different goals, techniques, and bases for evaluating them, should settlement conferences be mandatory? Both federal courts, through Rule 16, and state courts seem to be moving in this direction. The state of California has introduced such devices as "trial holidays" for weeks at a time (during which all judges work at settling cases and mandatory settlement and readiness conferences).[116] There are costs associated with such practices. If all cases had to pass through the mandatory settlement conference sieve, the queue for trial might get even longer and the additional rounds of settlement conferencing might cost clients more than they save in litigation fees. Until we know that more or better or different types of settlements are achieved through conferences, it may be a mistake to require all cases to pass through the process. Lawyers and clients may change their behavior if they expect to go through mandatory settlement conferences in all cases; they may increase initial demands and engage in more puffing as they dig in their heels for more settlement rounds. They may add to the number of negotiation sessions by engaging in routinized behavior to counter the routinized behavior of the settlement officer. If the merits of the dispute are explored in such conferences, it probably would be better practice to avoid settlement by the trial judge, especially in bench trials. On the other hand, some of the settlement authority of the third party may be directly related to the judge's power, control, or knowledge of the specific case, and the value of the conference may be diminished if another person is used.

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[114] At least one commentator has made this observation with respect to private negotiated settlement. Eisenberg, *supra* note 11, at 661–65.

[115] M. PROVINE, JUDICIAL SETTLEMENT TECHNIQUES (1985); Kritzer, *supra* note 98; Wall & Schiller, *supra* note 101.

Most importantly, we should be concerned about measuring what is accomplished in settlement conferences. On the one hand are important quality control issues: Judges with different personalities or role concepts may vary in the extent to which they use particular devices to achieve efficiency or substantive justice. Since some judges may be better at fostering settlement than others, should some judges or magistrates specialize in settlement conferences? Should all judges and settlement officers be trained to conduct the settlement process? On the other hand are important issues of substantive justice: Are judges, relieved from the public scrutiny of a written decision, settling cases to serve their own ends? Does the settlement conference compromise serious issues of public importance by hiding cases that should be aired in open court and achieve binary results?

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[116] *See* Title, *supra* note 2.

The settlement conference is a process that can be used to serve a number of different ends. How we evaluate its utility depends on whether we are looking at the individual dispute being settled, the numbers of cases on the docket, the quality of the results (measured against cases that would have settled anyway and cases that would have gone on to trial), the effect of the number and types of settlements on the number and types of cases that remain in the system, or the alternatives available. These considerations do not all point in the same direction. The evaluation of settlement conferences is something we will have to keep watching.

We might ask the procedural question: Who should bear the burden of proof on success? Critics like Fiss and Resnik assume that adjudication is the preferred process and challenge the "settlors" to prove up their claims. Judges and judicial administrators argue vehemently that settlement devices speed cases along and provide better settlements, and assert that adjudication be used only when a strong need for it can be shown. My own view is that settlement is now the norm. The pertinent question is how can it be used most effectively (for the parties and for other users of the system) when traditional adjudicators are brought into the process. Can judges, who are historically neutral rule declarers, fact finders, and expeditors, perform this new function without a new socialization process? As settlement conferences become mandatory, socialization of settlement officers and research and evaluation of the settlement process must be conducted simultaneously. If many judges use the sorts of "Lloyds of London" formulas described above, additional training will be necessary to expose settlement officers to the problematic aspects of these practices. Settlement officers will have to learn not how to commodify and monetarize all issues, but rather how to identify alternative issues that the parties may value differently, in the hope of reaching settlements that are fair, perhaps norm-based, and that take account of the parties' needs. To the extent that I have criticized the limited remedial imagination of courts,[117] the settlement conference provides an opportunity to temper the rigidity of win/loss trials with flexible solutions. Thus, on balance I support the movements toward mandatory settlement conferences, as long as they are "properly" conducted by settlement officers sensitive to the efficiency-quality problem. The usefulness of the mandatory settlement conference as a procedural device to improve quality settlements should not blind us to some of the dangers discussed above. Since settlement conferences are becoming mandatory, those who criticize settlement should join the efforts to understand, study, and deal with the problems presented by the process so that the interests of justice they value will not be lost in the search for more efficient ways to administer the litigation process.

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[117] *See* Menkel-Meadow, *supra* note 3.

One thing is certain—despite all the doubt about settlement conferences, they will continue to be held, perhaps in increasing numbers, in both state and federal courts. It behooves those of us who care about justice to be sure that those who conduct them understand the impact and effects of what they do, and carefully consider whether the overriding goal ought to be efficiency, case management, or better quality solutions. I cast my vote for quality.

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The Litigation Partner and the Settlement Partner

by Paul J. Mode, Jr. and Deanne C. Siemer

Pressure from courts and clients to resolve disputes without the cost and delay of full-scale litigation is increasing. We have had success in settling disputes that have descended into litigation (or are moving in that direction) by establishing separate litigation and settlement efforts under the direction of different partners. The litigation partner is responsible for getting the case ready for trial. The settlement partner is responsible for finding creative ways to bridge the gap between the disputing parties.

This approach results in part from the growing awareness that the litigator handling an active dispute may often be in the worst position to settle it. The things that make a great litigator tend to make a mediocre settler. Many of the most successful trial lawyers are driven by an overriding desire to win—preferably in a way that makes the enemy's defeat most public and unmistakable. Listening to someone else's views, understanding someone else's interests, solving someone else's problems—these essential aspects of settlement are likely to rank fairly low on the litigator's list of fun ways to spend a busy day.

In addition, once the case has been filed, many of the aspects of "shepherding the litigation" are "antithetical to the search for compromise." Freund, *Bridging Troubled Waters: Negotiating Disputes*, 12 LITIGATION, No. 2 at 43 (Winter 1986). In the push and shove of pretrial proceedings, whatever credibility had existed between the two sides is often further frayed. Moreover, an essential part of litigation—indeed an essential part of settlement—is the trial lawyer's ability to demonstrate his confidence in the outcome, his aggressiveness in attacking the other side, and his eagerness for the battle itself. There is a pervasive fear that any party making a settlement overture will be signaling a fatal weakness or lack of resolve. And as the trial date approaches, the same pressures that make settlement more likely are robbing the trial lawyer of the time and patience that may be essential to compromise.

Finally, the clients themselves contribute to the problem. Clients properly want their gladiators to be tough, loyal, and 100-percent committed to the cause. Many clients are reluctant to hear their trial lawyer suggesting, particularly at an early stage, that there should be serious consideration of compromise. And unless the client relationship is a long-standing one, the trial lawyer may fear that suggestions of compromise on his part would not be well received; "I was hired to win this case, not settle it."

In the face of these barriers to compromise, it sometimes seems surprising that trial lawyers settle as many cases as they do. Nevertheless, we believe that the new sensitivity to these issues is justified: lawyers are not settling as many cases, as early in the process, as we ought to be in the interests of our clients and of the public. We think that the use of a two-track, settlement-partner litigation-partner approach has promise in this regard, because it deals head-on with many of the problems described above. Out of our firm's successful experience using this technique in several major matters over a half-dozen years, we have drawn some general guidelines.

1. *The settlement partner starts on the case when the litigation partner starts.* Nearly every dispute deserves a good faith effort at settlement. The settlement partner can have the most impact if he starts as early as possible. Settlement often involves a long-term effort to overcome years of bad feelings among the parties. It is difficult to assure that every reasonable effort has been made to settle the matter if the settlement partner comes in at the last minute. Even midway through the pretrial preparation of the case, important opportunities to settle may already have been lost. And remember, there is always the possibility that the client will end up needing to negotiate a settlement after the trial is over. Good litigators understand better than anyone that every trial is a roll of the dice.

In an appropriate litigation matter, we explain to the client our preference to assign a settlement partner to the case at the outset or at some other early point, and we discuss the added costs of this effort. Settlement opportunities arise unexpectedly, and the client needs to be positioned to take advantage of them. Often the settlement partner's efforts will be dormant for months because of developments on the opposition's side. But there should be someone scanning the horizon for possibilities, so that when an opening occurs, the settlement effort can proceed promptly. The persistence required to get a good settlement is often underestimated. And there must be continu-

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ing effort to build credibility and understanding when the time is available; it is too late to start on the courthouse steps.

2. *The settlement partner works apart from the litigation team.* Settlement is fundamentally different from litigation. Litigators search for the most forceful presentation of their client's position, the most damage they can do to the other side, and the most limited disclosure of useful information. Settlement lawyers have to concentrate on understanding the other side's position, finding ways to meet the other side's problems (including lack of information), and dealing with the client's concerns about whether settlement is a worthwhile proposition. Litigators can hardly avoid barbed comments or enjoying pretrial victories that create hostility on the other side. Settlement lawyers need to present a demeanor that will facilitate continued, meaningful communication even while the pretrial process is going on.

For these reasons, one of our first guidelines is that the settlement partner works apart from the litigation team. The settlement partner and the lead litigation partner need to be on the same wavelength to work comfortably together and to keep each other well-informed of developments. But the rest of the litigation team will actually function better without knowledge of the settlement developments. The settlement partner's research requirements, if any, should be met by lawyers not on the litigation team. The settlement partner's contacts with the client should be outside the normal contacts of the members of the litigation team.

There is always the danger that the settlement effort will break down and the trial will have to go forward. It is a benefit for the litigation team if they have not been coasting while settlement looked promising. Indeed, the unremitting pressure of vigorous litigation will often facilitate settlement.

3. *The settlement partner stays current on major developments in the litigation.* Although the settlement partner's efforts are separate from the litigation function, he stays current on major developments in the case. This involves reviewing the most important pleadings and meeting informally with the litigation partner to keep current on matters that could affect the climate of negotiations. The settlement partner needs this knowledge to be effective in dealing with the other side.

Moreover, the settlement partner can frequently advise the litigation partner on the settlement-related aspects of a pending tactical or strategic decision. For example, in addition to the normal litigation consequences, a decision about whether to move for summary judgment or about the pace of pretrial activity may affect the negotiating environment or some particular interest on the other side. A well-informed settlement partner can provide useful input into that decision.

The litigation partner is by no means isolated from settlement. He is kept fully informed by the settlement partner, and the two consult on important changes in settlement strategy and tactics. If negotiations look promising, there may be advantages to having the litigation partner join in the settlement discussions. But the two partners continue to have differing principal responsibilities.

4. *The settlement partner is in charge of analytical work that is critical to settlement.* In separating the settlement and litigation functions, it is necessary for the settlement partner and the litigation partner to have a good working relationship and an understanding of who is in charge of what. We have found that it is useful to have the settlement partner in charge of three basic types of analysis:

Independent Risk Analysis: The settlement partner does the litigation risk analysis. The litigation partner contributes to risk analysis by identifying the probabilities of certain outcomes, but the settlement partner provides a useful balance to the litigation partner's combat-oriented approach. The settlement partner tends to have a more independent view of the litigation prospects than the down-in-the-trenches litigator, particularly as the case draws closer to trial. Often the settlement partner will suggest different probabilities and, with the benefit of a personal computer, will try out these various approaches to see what changes they make in the outcome. The settlement partner maintains the risk analysis as the case proceeds, updating it and changing the analysis as the case progresses.

Business Analysis: Settling or litigating can have significant business consequences with respect to customer relations, supplier relations, shareholder relations, banking relations, public relations, accounting matters, access to debt and equity capital, product development costs and other business factors. The settlement partner should be in charge of reviewing these with the client because that will provide a better picture of the true costs on both sides of settling or not settling.

Tax Analysis: The settlement partner is responsible for any tax analysis with respect to settlement opportunities or possible litigation outcomes. Tax considerations are often very important in bridging gaps between parties: a given dollar amount can have very different after-tax consequences depending on the form and characterization of the payments and the circumstances of the parties. A thorough understanding of the tax positions of both parties will help the settlement partner find a common ground.

Of course, the settlement partner should keep the litigation partner advised of useful information discovered in the course of his analysis. There is a possibility of material slipping between the cracks when two people are playing these roles, and both should be attentive to avoid that danger.

The settlement partner shares responsibility with the litigation partner in one significant area:

Information Sharing: To settle, it is often necessary to share information with the other side. Much of this information may be sought by the other side in discovery. The settlement partner and the litigation partner need to decide what can be shared and when and how best to achieve the desired results.

The settlement partner relies on the litigation team's work in one other area:

Legal Analysis: The settlement lawyer does not revisit or redo any of the litigation team's legal analysis. The settlement lawyer may want to present the results of this research to the other side in a less combative but equally persuasive way. This aspect of the case, however, is controlled by the litigation partner.

Within these general guidelines, the litigation partner and the settlement partner work out an appropriate allocation of other work that arises as the case proceeds.

5. *The settlement partner works with the client in a context separate from the litigation effort.* One of the principal benefits of the litigation-partner settlement-partner approach is that it helps overcome the ambivalence of the client about settlement.

Clients expect their litigators to be hardnosed. It is often confusing when the litigator shows up to discuss settlement. The client may wonder about the litigator's devotion to the cause and whether he or she has had a change of heart. Even sophisticated clients find it difficult to shift gears from a discussion about obliterating the other side in court to a discussion about concessions to the other side in negotiation.

Under the separate partner approach, when the trial partner shows up, it is for the purpose of talking about litigation. When the settlement partner shows up, it is for the purpose of talking about settlement. Although the two partners work closely together and both may be present at important meetings with the client, the settlement partner does not bear the "two hat" burden that may impede the trial lawyer who is also acting as the settlement contact point. A settlement lawyer can avoid the client's concerns about whether approaching the other side is a sign of weakness, because the client is reassured that the litigator is battling away in the trenches regardless of the settlement effort.

The settlement lawyer may start to draft the proposed settlement agreement early in the process, sometimes even before the other side has begun to work seriously at settlement. This helps to focus the client on what he really wants and flushes out difficulties that might sabotage a settlement if they appeared unexpectedly later on. The settlement partner also brings a problem-solving approach to the client's difficulties with compromise that helps put settlement into a dollars-and-cents business context rather than the "matters of principle" that often dominate such discussions.

6. *The settlement partner makes recommendations on the appropriate forms of alternative dispute resolution to be used in the case.* The settlement partner may decide that one of the available forms of alternative dispute resolution is appropriate to the case. These include:

- mediation
- arbitration
- mini-trial
- summary jury trial

and other ways to get the parties to focus on the facts of the dispute. The settlement partner may also recommend a mock

(Please turn to page 50)

the costs are borne by seriously injured plaintiffs and by consumers who ultimately pay for these costs through higher prices for goods and services as a result of increased insurance premiums. And yet these same consumers are the ones who sit on the juries. Are we really in a crisis from lack of consumer understanding and education of the impact of their actions?

It is incumbent upon the trial bar not to support the status quo merely because it is in our economic interest. Change is in the wind, and our tort system will be blown away on the winds of change for change's sake, unless we participate in correcting deficiencies in the tort system and civil jury trial process. We must also preserve the efficient, appropriate, and productive aspects of that process. At the same time, it is appropriate to oppose legislative efforts to graft onto the tort system those remedies that are more appropriate for administrative and alternative means of dispute resolution. The American public still demands access to our civil jury system, and we should resist any effort to reduce that access. Our tort and civil jury system has been a valuable and indispensable means of dispute resolution by allocating responsibility between the parties. A new broom sweeps clean, but we do not need a new broom—merely an examination and modification of the existing one.

Partners

(Continued from page 35)

jury trial to orient the client to the likely outcome if the matter proceeds to trial.

7. *The settlement partner's time is billed separately.* In one recent experience, the separate settlement effort added about five percent to the client's overall bill from our firm for a large case which settled on the eve of trial. (Some of this amount would have been spent even if there had been no settlement partner, because the litigation partner would have brought in others to consult on some important tactical and strategic judgments.) If the case settles earlier in the pretrial process, the percentage cost may be higher, but the total bill almost certainly will be substantially lower. It is useful to have clients view settlement as a separate effort that can be controlled with respect to cost. Separate billing of settlement (partner and associate time on settlement matters), even if it is only a separate entry on a consolidated bill, will help the client accept the process and enhance the client's control, which is often critical to success. Where the client is a corporate law department, the inhouse lawyer supervising the matter may well have the necessary interest and availability to serve effectively as the separate settlement attorney.

We think this two-track approach has real merit in the right case. Certain kinds of cases seem particularly well suited to it: expensive, high stakes cases of substantial complexity; cases in which a defendant must deal separately with a number of plaintiffs in parallel proceedings; cases in which multiple defendants must settle both with a plaintiff (or plaintiffs) and among themselves. Even in smaller, less complex cases, it may be cost effective to pursue this approach for a few hours or days at the outset.

We were interested to see the two-track approach advocated recently by Professor Roger Fisher, whose *Getting to Yes: Negotiating Agreement Without Giving In* (Houghton Mifflin 1981, Penguin 1983) has become a touchstone of the new settlement consciousness. Indeed, it is one of the major proposals Fisher sets forth in a hypothetical letter from a chief executive officer to his outside litigation firm urging efforts to settle more matters and to settle them earlier. Fisher, *He Who Pays the Piper,* 63 HARV. BUS. REV., No. 2 at 156-57 (March-April 1985).

Just as every case is different, every settlement is different. We are still experimenting with and still learning about how to use the two-partner approach to settlement. But we think it is a useful device that should be considered in any major litigation.

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Summary Jury Trials

by Thomas D. Lambros

Most cases settle. Although the jury trial continues to be at the core of our system of justice, the expense and burdens of taking a case that far suggest that it should be a method of last resort.

Fair settlements can be reached in even the most complex cases through the thoughtful use of other methods. One that has proved particularly valuable is the summary jury trial.

A summary trial is an abbreviated presentation to an advisory jury to show the parties, the lawyers, and the judge how jurors react to the dispute. The procedure is nonbinding, unless all parties agree otherwise, and so it does not impair the constitutional right to a trial by jury. Summary jury trials foster settlements by immersing the parties in the trial experience and giving them an advisory verdict.

The summary jury trial is my way of linking the great heritage of the jury trial with modern methods of resolving disputes. Before joining the federal bench in 1967, I was a trial judge on the Court of Common Pleas for Ashtabula County, Ohio. On both the state and federal benches, as I watched the growth of court dockets across the country, I saw a need for new, efficient procedures that retain the good aspects of the jury trial while encouraging settlements. So I invented the summary jury trial as a way to reduce the stresses on the judicial system while safeguarding the time-tested process of trial by jury.

The summary jury trial is not intended to replace the traditional jury trial. Instead, judges can use it to settle cases when negotiations fail.

In the right case, a summary jury trial is effective for a variety of reasons. The parties are generally more receptive to settlement after they see how jurors react to the conflicting evidence, test the strengths and weaknesses of their arguments, and have the satisfaction of speaking their piece in court.

A summary jury trial often produces the same sorts of psychological strains on the litigants as a full-blown jury trial. The specter of an approaching summary jury trial usually intensifies the parties' efforts to settle.

Because the parties are required to attend the summary jury trial, the procedure is particularly effective when the trip through the legal labyrinth begins to tax their patience. And when the summary jury trial shows them what they have been too blinkered to see on their own when they were sitting across the table glaring at each other, settlement discussions may become more meaningful.

Conserving Valuable Resources

Summary jury trials are also valuable because they conserve resources. Court dockets are more crowded than ever, and the costs of litigation are spiraling upward. Summary jury trials result in substantial savings because they settle cases at an early stage.

The savings are twofold. First, the costs to the parties are reduced because the litigation is abbreviated. The costs they avoid include lawyers' fees for prolonged court appearances, expenses of support staff and paralegals, fees of expert witnesses, and the other costs to the litigants when they have to spend weeks on end in a courtroom. Second, because summary jury trials facilitate settlements, they free up court time for those cases that really require full jury trials.

In every case, the judge should consider whether a summary jury trial will make a settlement more likely. Whether it will be the most effective way to settle a case depends more on the dynamics of the controversy than on the causes of action involved. Summary jury trials have been used in cases ranging from simple negligence and contract actions to complex mass-tort and antitrust cases.

The summary jury trial is intended for hardcore cases that defy settlement and appear destined for trial. A summary jury trial is appropriate if the discussions have reached an impasse, but the judge believes that he can break the deadlock by exposing the parties to the objective verdict of an impartial jury.

Federal and state judges have the authority to manage their dockets by using alternative methods to settle cases. Under Federal Rule of Civil Procedure 16(c)(7), a district court may adopt a local rule specifically authorizing summary jury trials. Even

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without a local rule. Federal Rule 16(c)(7) empowers a district judge to "consider and take action with respect to the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." The judge's broad pretrial management powers under Rule 16 plus the mandate of Rule 1 that the Federal Rules be applied "to secure the just, speedy and inexpensive determination of every case" give the judge the authority to conduct summary jury trials.

Lawyers should consider requesting summary jury trials. The final pretrial conference is when the judge and counsel most often explore alternatives to the full-scale war of a jury trial. Particularly then, lawyers should ask themselves: Have I done everything I can to resolve this case favorably to my client? Is there an alternative to exposing my client to the stress and expense of trial? Is my client (and am I) too emotionally involved in the case to evaluate it objectively?

The summary jury trial is effective when settlement seems impossible because of a client's unyielding attitude. The procedure is a safe and inexpensive way to show a recalcitrant client that his case is weak.

It may also be helpful if a client feels that settlement would be an admission of weakness. The psychological satisfaction of courtroom combat is important to many litigants. A summary jury trial gives them the opportunity to tell their story to an impartial group of their peers. Having had their day in court, they may no longer regard settlement as cowardly.

The summary jury trial has three phases: pretrial conferencing; jury selection and formal presentations; post-trial discussion and conferencing.

Effective pretrial conferencing is essential. At the beginning of the litigation, the judge should suggest a summary jury trial, so that counsel will be prepared if this alternative is later adopted. In subsequent conferences, the judge should thoroughly explore settlement and again raise the possibility of a summary jury trial. The decision to use a summary jury trial is usually made at the last regularly scheduled pretrial conference.

Once the judge decides to use a summary jury trial, the remainder of the conference is devoted to questions about the procedure. With proper preparation, the proceedings will go smoothly and quickly. To ensure that everyone understands the process, the judge should distribute a written explanation (or a copy of this article) to the lawyers and their clients.

Preparing for Trial

During the conference, the judge should make sure that all necessary discovery has been completed. He should also rule on all pending motions on the merits, so that the parties' presentations will closely parallel the actual trial.

Because the summary jury trial is nonbinding, evidentiary and procedural rules should be few and flexible. Nevertheless, at the conference, the lawyers should raise any questions about the materials they want to present, including any opinions, and the judge should rule on anticipated objections and consider motions *in limine*.

No later than three working days before the date of the proceedings, counsel should submit proposed jury instructions and briefs on any novel issues of law. Each party should file a trial memorandum and may submit proposed voir dire questions. If necessary, the court may require the parties to submit exhibit lists and lists of witnesses whose testimony will be summarized.

If the case warrants, the judge should schedule an additional conference right before the summary jury trial. It is a good idea to require the litigants to be there. The final conference is an excellent opportunity for the parties to engage in intensive settlement discussions. At this point in the litigation, the lawyers are practically ready for trial. The strengths and weaknesses of each side's case are coming to light. The parties realize that the verdict of the advisory jury will unalterably affect their bargaining positions and that all further settlement demands will be measured against it.

If the case does not settle, the proceedings begin. A summary jury trial is like a regular jury trial, only shorter. A venire of a sufficient number is called to provide a jury of six; alternates are unnecessary for this abbreviated proceeding.

To expedite jury selection, the jury commissioner gives the prospective jurors a questionnaire asking for name and occupation; marital status; spouse's name and occupation; names and ages of children; previous knowledge of the parties, counsel, or the case; and any prejudicial attitudes toward the parties or their causes. In certain cases involving complex issues, a more detailed inquiry is appropriate.

While the potential jurors complete their questionnaires, the judge again meets with counsel. Often, the imminence of a summary jury trial produces a settlement.

If not, the judge calls the court to order and makes a few introductory remarks. He briefly explains the nature of the case, as well as the summary jury trial procedure. He says that the lawyers have reviewed the relevant materials, interviewed the witnesses, and condensed the evidence, which they will present to the jury in narrative form. He tells the jurors that they will later be instructed on the applicable law and the use of a verdict form.

The jurors are told that the proceeding will be completed in a single day and that their verdict will help the parties to resolve the dispute. The nonbinding character of the trial is not emphasized. The jurors take an oath to return a true verdict based on all the evidence.

After this introduction, the judge conducts a brief voir dire, generally posing questions to the full panel of jurors. The judge and the lawyers also have the jurors' responses to the profile questionnaire. Counsel may exercise challenges for cause, as well as two peremptory challenges. The first six jurors seated after the challenges constitute the panel.

Before the formal presentations, each side should give a five-minute overview so that the jury can see the entire landscape of the controversy. Normally, the lawyers then have one hour each for their presentations.

Usually, the plaintiff devotes 45 minutes to its case-in-chief, followed by the defendant's presentation of about the same length. The parties may then use their remaining 15-minute periods for rebuttal and surrebuttal. In complex cases, counsel should be given additional time so they have an opportunity to make comprehensive presentations.

Regardless of the time allotted, the lawyers should remember the overall goal of brevity. Just as the summary jury trial is a streamlined version of a formal trial, so should the attorneys' presentations be pared to the bone.

Summary jury trials eliminate the long, drawn-out process of direct and cross-examination. There is no time for pettifoggery or verbal sophistry. The most effective presentations are those that, early on, highlight the unique personality of the case.

The lawyers' presentations are limited to summaries of evidence that would be admissible at trial. Although counsel are permitted to mingle representations of fact with legal arguments, they should be responsible and restrained in their arguments. They may summarize, comment on, and quote from the evidence, depositions, interrogatories, responses to requests for admissions, and sworn statements of potential witnesses.

In the absence of a sworn statement from a witness, the lawyer may summarize the witness's probable testimony on the basis of his conversations with that witness. But he must tell his adversary beforehand that he plans to do this, so that the adversary, too, has an opportunity to speak to the witness.

Physical evidence, including documents, may be exhibited during the lawyers' presentations and submitted for the jury's examination during deliberations. One effective way to present documents is to prepare an exhibit notebook for each juror, as well as an enlargement of each exhibit to display during counsel's oral presentation.

The most effective presentations are those that, early on, highlight the unique personality of the case.

Although most objections should be handled before the proceeding, the court may entertain objections at trial if counsel exceeds the limits of propriety. Besides applying the rules of evidence in a practical way, the judge should ensure that the representations made by counsel accurately reflect the nature and the weight of the evidence.

For example, if the plaintiff tries to establish a crucial fact by the rather questionable testimony of one witness, and the defendant can present five independent witnesses to refute that testimony, the plaintiff's lawyer should not be allowed to assert the crucial fact as irrefutable truth. The lawyers should also be reminded of Disciplinary Rule 7-106 of the Code of Professional Responsibility, which forbids them from asserting personal knowledge of the facts in issue, or personal opinions as to the justness of a cause or the credibility of a witness

Given the general flexibility of a summary jury trial, there are few hard and fast limitations on the lawyers' presentations. A lawyer should not hesitate to ask the judge to adapt the proceeding to the requirements of the particular case. For example, the judge may permit key witnesses to testify in an abbreviated form, especially in a case that turns on the credibility of a particular witness's testimony.

A lawyer may also be allowed to use a videotape to summarize his case or to show the jury actual witnesses or physical evidence. This method was used in a personal injury case before Judge Lee R. West, of the United States District Court for the Western District of Oklahoma. The tape gave an overview of the plaintiff's case, and it included an animated reconstruction of the accident scene. It also showed the litigant's injuries and their effect on his everyday life.

A Practical Charge

At the close of the lawyers' presentations, the judge should give the jurors a practical understanding of the applicable law. He should avoid unnecessary detail and should explain to the jurors, in a straightforward manner, the basic principles they need to apply to decide the case fairly.

The jurors are told that they should attempt to return a unanimous verdict. They are given a verdict form containing specific interrogatories, a general liability inquiry, and an inquiry about damages. The judge may tell the jurors that if, after diligent efforts, they are unable to reach a unanimous verdict, they may return separate verdicts. He may distribute separate verdict forms initially or wait until after the jury reports a deadlock to mention separate verdicts.

Once the jury has been excused to deliberate, the judge may engage the parties in further settlement negotiations. These negotiations have a special urgency, since they are conducted in the shadow of an impending verdict.

When the jurors complete their deliberations, they return either a consensus verdict or separate verdicts. Then the judge, the attorneys, the parties, and the jurors talk.

The judge may ask the jurors to give their perceptions of the attorneys' presentations or to explain the reasoning behind the verdict. The lawyers are encouraged to discuss the case with the jurors.

If the case cannot be settled during or immediately after the summary jury trial, another conference is scheduled for about a month later. The delay gives the parties a chance to digest the results of the advisory procedure.

During the subsequent conference, the discussion focuses on the advisory verdict and the jurors' comments on the case. Everyone must recognize that another jury would probably return a similar verdict if the case goes to trial. Settlement is the next logical step. If the case still cannot be settled, it is set down for a regular jury trial, which is normally held within a month, but which may be postponed if settlement negotiations continue.

Summary jury trials focus the parties on the essential issues. So, if the regular trial does go forward, it takes less time and runs more smoothly than it otherwise might.

The traditional jury trial is still the foundation of our system of justice. But the summary jury trial has proved to be effective in resolving complex disputes because it provides an objective prediction of how a regular jury would decide the case. □

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Columns

Court-Appointed Masters as Mediators

Lawrence E. Susskind

Judges often appoint special masters to help with complex cases. In many of the desegregation cases of the 1970s, for example, special masters were assigned to oversee the development and implementation of court-ordered busing plans. In bankruptcy proceedings, special masters serve as court-appointed executors to preside over the liquidation of holdings. Judges have also appointed special masters to serve as "receivers" of public agencies and to oversee implementation of consent decrees involving reforms at prisons and mental institutions.[1]

And, during the past few years, federal and state judges have employed special masters in a new way—as mediators in complex public policy disputes. I recently served as a special master in a multi-party, multi-issue environmental dispute, and the experience proved to be both novel and instructive. Functioning primarily as a mediator, my assignment was to help the parties develop a strategy for allocating the costs of a long-delayed pollution cleanup effort.

More than forty municipal, regional, and state agencies have a direct interest in this case. One of the municipalities in the region brought suit against the regional sewage authority, challenging the design of the proposed county-wide sewage system and the proposed allocation of costs for the cleanup. Other communities and interested parties also filed suit, and the regional authority asked the court to consider all the claimants together, in order to avoid a succession of separate suits.

Some of the smaller towns in the county believe that they should not be required to join an expensive regional sewage system. They assert that septic systems which naturally percolate waste through the soil or other small-scale, locally-managed waste disposal systems are adequate for their needs.

There is a great deal at stake. According to the sewage authority, it may cost as much as $600 million to meet the federal clean water standards that go into effect in 1988. By one estimate that will require additional sewer fees of more than $300 per household each year for at least 20 years.

The state Superior Court imposed a ban on all new sewer connections pending a resolution of the cleanup dispute, bringing the development community and a great many landowners into the conflict.

The U.S. Environmental Protec-

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tion Agency and the state environmental agency have sought through the courts to require the communities involved to clean up the rivers and streams in the county. For the fourteen years that the parties have moved in and out of court, only minimal investments have been made to keep the older local treatment systems in operating order. In the meantime, no cleanup has taken place, the regional authority has run up a large debt in preparing engineering studies, the cost of building any kind of system has inflated tremendously, and federal funds to subsidize the construction of sewage treatment facilities have dried up. To put the cost of the dispute in perspective, I was shocked to discover that the entire sewage system could have been built in 1972 for an amount equal to the current $72 million debt the authority has accumulated in legal fees and borrowing (necessitated, in large part, by the unwillingness of the cities and towns to start paying sewer charges to the regional authority).

I cannot provide more details about this case because it has not yet been fully resolved. However, several key lessons regarding the use of court-appointed masters as mediators seem obvious to me even at this point, and I want to share them while my impressions are still fresh. I invite other court-appointed masters in complex public disputes to share their experiences and to react to my comments.

Why Use a Special Master As a Mediator?

There are at least three reasons why a judge might ask a special master to mediate. First, in highly complex cases, where a judge feels the judicial process is too constraining to work out the elaborate interplay of technical issues and competing economic interests, he or she may use a master with specialized expertise to try to work out an accommodation among the parties. Along the same lines, a judge might ask a master to seek a mediated solution as a way of encouraging speedy resolution of a conflict in a situation in which continued appeals would only exacerbate the problem. One mediator I know was appointed as a special master in a complex dispute because any further delay in settling the hostilities might actually have cost additional lives.

A second reason for appointing a special master to mediate is to narrow the range of issues that the court must address, saving time and money. In complex disputes the process of discovery can go on for an extended period. Also, when technically sophisticated witnesses must be cross-examined, the judge and jury may be hopelessly beyond their abilities to follow the arguments presented.

In my case, I was fortunate to have a highly skilled team of assistants and expert consultants. With their help, and the help of my co-mediator (who provided a local point of contact for the parties since I am from out-of-state), we produced a computer model that the parties can use to test the cost implications of alternative settlement packages.

The complexity of some court proceedings can be reduced or avoided if a mediator can bring the parties to a stipulated agreement on some of the issues or, at least, get them to agree to a certain body of factual material through an informal process of joint fact-finding. Unconstrained by the formal rules of evidence and court procedure, a mediator may be able to assist the parties (and the court) in narrowing and illuminating the issues.

A mediator, meeting privately with

each of the parties, may also be able to pinpoint the most serious concerns of each party as well as their true "walk away positions" on key issues. Armed with this information, especially in cases that do not involve questions of fundamental rights, the court may be better able to develop an order that all sides will accept; such an order, in turn, would head off lengthy and costly appeals.

A third reason a court might ask a special master to mediate is to help generate new ideas for the parties to consider, thereby encouraging out-of-court settlement. Judges are rarely expert enough on the issues before them to propose entirely new options for the parties to consider. A special master (with access to independent technical assistance) may be able to come up with good ideas that none of the parties had considered. A technically-skilled, nonpartisan intervenor is often in an ideal position to invent ways of reconciling the interests of the parties that all sides will find satisfactory.

Many special masters function solely as fact-finders or arbitrators (in the sense that they make recommendations to the court suggesting ways of handling the differences among the parties). Special masters functioning as mediators, as I did, seek to assist the parties in reaching an out-of-court settlement, or at least an accord that the court will accept. Unlike other informal mediation situations, however, the special master has certain powers that most mediators do not have. I found these a bit overwhelming at first, and, in the end, I discovered that they also have their drawbacks.

The Powers of the Special Master

The court can require the parties to appear before a special master. This is certainly something that mediators are not used to. Usually a mediator has to spend a great deal of time establishing his or her credibility and convincing all the parties to come to the negotiating table. When mediating as a special master, it is not necessary to "sell" the parties on the advantages of using an outside helper. In general, there are few problems of entry (e.g., being asked to mediate by one side and then having to convince the others of the mediator's nonpartisanship).

Because the court can issue an order embodying the results of an informal negotiation, the parties to a dispute are not as likely to be skeptical about the value of the informal process. Indeed, the prospect of court enforcement of a negotiated agreement frees the parties from having to invent ways of holding each other to their commitments.

A special master can use the threat of the formal discovery process to encourage the parties to be forthcoming with technical information. In addition, if the special master has access to his or her own technical advisers (which was the case for me), he or she may well be able to head off conflicts over facts and forecasts. This should help focus the parties on ways of dealing with their differing interests.

While I would not necessarily advise it, the master can ask the judge to require the parties to provide a written indication that they have considered certain options put forward by the other side or by the mediator. Most mediators have no way of forcing the parties to give serious consideration to such alternatives, or to force a party to spell out why a certain proposal is unacceptable.

The court can monitor implementation of an agreement and guarantee the parties that, if circumstances change, an agreement can be reopened. This promise may encourage the parties to explore contingent commitments that would otherwise seem unrealistic. The possibility of contingent agreements, in my view, increases the likelihood of settlement.

As a mediator, it was a heady feeling to be able to tell the parties where and when I wanted to meet. By the way, this made it possible for me to accomplish a great deal more in a shorter time, since I didn't have to do as much travelling. All in all, the prenegotiation stages of the mediation process were much easier than usual. I should point out, though, that we still had enormous difficulty reaching an accord.

The Drawbacks

There is a downside to each of the points I've mentioned. For example, when the parties don't feel that their participation in the mediation process is really voluntary, they spend a great deal more time behaving like adversaries. They treated me as if I were a judge, making it difficult for us to move into a problem-solving mode.

The parties felt they needed to have their lawyers present when they met with me. As every mediator knows, that is not necessarily the best context in which to work on the invention of ways to maximize joint gains.

Also, since the parties were not consulted explicitly by the judge about my selection, they did not necessarily feel that I was going to be responsive to their concerns. I should note that the judge did give the parties a chance to comment on his intention to appoint a mediator. He also chose an organization within the state as the institutional setting through which I could work; that organization had suggested my name to the judge.

When the mediation process takes place within "the shadow of the robe," constraints emerge that generally do not affect mediators who operate informally. One such issue was the question of due process. Should all parties be given a chance to cross-examine those presenting information to the mediator? Should the mediator be bound by *ex parte* rules? Should all mediation sessions be conducted in public?

All of these questions were raised, and I know none of the answers. I do know that, beyond a certain point, the imposition of too many due process requirements will undermine the value of mediation. On the other hand, if the judge issues an order based on a mediator's report (regarding the progress the parties have made in trying to reach agreement) and the parties are not entirely happy with what the mediator has to say, they may have a legitimate due process complaint.

The judge in my case responded to these concerns in what seemed to me to be a very intelligent manner. First, he asked for a written report that he could distribute to all the parties. He gave them a chance to comment on both the substance of the report (i.e., primarily a statement of principles for handling the cost allocation problem) as well as the mediation process by which the principles were developed. He did this before he made any comment or took any action. Second, he offered to hold plenary hearings on particular issues that any party felt had not been adequately addressed.

The judge encouraged me to meet privately with each of the parties. I promised them confidentiality to the extent the law permitted me to do so. Based on the ideas generated in these private meetings, we circulated drafts of proposed agreements that I wrote (with the help of my co-mediator and a very able staff from within the state). Then, we organized a public session to review reactions to a draft of the proposed agreement. Still other drafts were developed, following further private communications with concerned parties.

While my goal was to help the parties achieve an agreement, it seemed from the outset that the most likely outcome was a court order embodying as much of the negotiated agreement as possible. Some of the parties clearly felt that only a court order would ensure compliance by the others; in addition, it would allow many of the public officials involved to explain to their constituents that the agreement was something they had been ordered to accept.

A mediator operating as a special master may find, as other mediators often do, that for some parties delay is their best option. Under normal mediating circumstances, a mediator explains to the parties that there is no point continuing if a key player decides to "sit out" the negotiations or remains doggedly uncooperative. A special master, however, must keep going as long as the judge says to keep going. Since the master is working primarily for the judge rather than the parties, he or she must continue with the process. I was extremely uneasy about the conflict this situation created between my obligation to the parties and my responsibility to live within the time and legal constraints imposed by the judge.

Some Guidelines

Based on my experience and weighing the advantages and disadvantages of mediating as a special master, I would urge judges to consider using masters as mediators in certain complex cases, particularly those involving a great deal of scientific or technical uncertainty.

Judges, however, should be aware of the conflicts that mediating as a special master can create for the mediator and the confusion that this form of mediation can cause the parties.

Also, mediation takes time. If the court is only interested in saving time (and not necessarily in working toward an out-of-court settlement), mediation might not be appropriate. While I believe that mediation can save time in the long run (by avoiding a lengthy appeals process), it may initially take extra time.

The court should try to clarify at the outset what its due process expectations are, and these should be explained ahead of time to everyone involved. The extent to which the mediator can promise confidentiality should also be clarified at the outset. In disputes involving the allocation of public resources, I would urge masters/mediators to include as many public sessions as possible.

In addition, I would encourage masters to maintain close contact with the news media and to serve as the point of contact for reporters interested in keeping track of developments. An unwillingness to talk with the press is likely to lead to pressure on the parties to negotiate through the press. This guideline, of course, should be discussed ahead of time with the judge.

I believe that the parties to a dispute should be given a chance to help design the process of mediation that the master/mediator will use. They should also, in my view, have veto power over the selection of a particular special master. The more involved the parties are in the design of the mediation process, the less troublesome the mandatory nature of court-supervised mediation will be.

In my view, judges should try to select mediators with expert knowledge of the substantive issues at stake, or at least be prepared to provide sufficient financial resources for the mediator to build a technical staff. This, I think, is key to encouraging joint fact-finding.

Finally, when judges circulate copies of the master/mediator's final report (especially if it is a negotiated agreement), I would urge they not ask the parties if they are entirely happy with the product. This will merely encourage the parties to retreat to their original positions if they have not gotten everything they wanted. Instead, judges should use a single text negotiating procedure—inviting all the parties to improve the mediator's proposed agreements when they are in *draft* form.

Obviously, one case is insufficient as a basis for drawing firm conclusions. I look forward to hearing from other special masters.

NOTE

1. For more information, see Henry R. Perritt, Jr., "'And the Whole Earth Was of One Language'—A Broad View of Dispute Resolution," *Villanova Law Review* 29, no. 6 (November 1984):1297–1304. Also, see "Implementation Problems in Institutional Reform Litigation." *Harvard Law Review* 91 (1977):428–463.

3. GOVERNMENT ADR POLICIES AND PRACTICES

A. Survey of Federal Agencies

4/30/87

3. GOVERNMENT ADR POLICIES AND PRACTICES

A. SURVEY OF FEDERAL AGENCIES

This survey seeks to "catalog" the current uses by agencies of alternative means of dispute resolution, other than negotiated rulemaking. It is based on a review of all references in the United States Code to the terms "arbitration, mediation, conciliation, negotiation, or informal", on questionnaires to federal agencies, and on reports of programs that have come to our attention informally.*

It *excludes* for the most part programs dealing solely with labor relations, even though historically these programs have made the greatest use of ADR techniques. They are not included because in the context of ADR, the labor area is viewed as unique and because they so closely resemble their private sector counterparts.

Commodity Futures Trading Commission.

The Commodity Exchange Act of 1974 (Pub. L. 93-463) established a reparations procedure by which individuals alleging injury under the act, as a result of a violation caused by a registered commodities trading professional, could have their claims adjudicated by the CFTC. The Act offers this reparations procedure as an alternative to civil litigation or resort to a privately sponsored dispute resolution mechanism. Congress amended the reparations provision in 1982 (Pub. L. 97-444, 96 Stat. 2308, 7 U.S.C. § 18 (b)) to grant CFTC the power to promulgate rules, regulations, and orders necessary to provide for the efficient and expeditious administration of reparations claims. CFTC's subsequent rules created a three track decisionmaking procedure including (1) a voluntary decisional procedure (analogous to commercial arbitration), (2) a summary decisional procedure for claims of up to $10,000, and (3) a formal ALJ decisional procedure for claims exceeding $10,000.

The Commodity Exchange Act also encouraged private sector mechanisms for dispute resolution in requiring designated contract markets and registered futures associations to provide a voluntary equitable procedure through arbitration or otherwise, for the settlement of customers' claims and grievances against any member or employee. See 7 U.S.C. §§ 7A(11), 21(b)(10). There is currently no limitation on the monetary value of claims which may be subject to arbitration. The Commission recently amended its rules under 17 CFR §§ 170.8, 180.2 to encourage the use of arbitration as a means of dispute resolution. See 48 Fed. Reg. 22,136. The National Futures Association has recently introduced an arbitration program that has been used in many disputes. These processes are discussed at length in Philip J. Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process* and Marianne K. Smythe, *The Reparations Program at the Commodity Futures Trading Commission: An Alternative Means of Dispute Resolution*, both reports to the Administrative Conference of the U.S.

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* The content of this survey is derived largely from an appendix in Philip Harter's 1986 report to the Conference, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*. That appendix has been updated and expanded by the Office of the Chairman of the Administrative Conference.

Consumer Product Safety Commission.

Under the Federal Hazardous Substances Act, 15 U.S.C. § 1266, the Commission must provide any person alleged to have violated the Act appropriate notice and opportunity to present his views either orally or in writing prior to the Commission's referring a case to the U.S. Attorney for criminal prosecution. The Commission is also required to use informal dispute resolution procedures under 5 CFR § 752.404 in the settlement of any employee disputes.

Department of Agriculture.

Packers and Stockyard Division. Private parties may file complaints under the Packers and Stockyards Act. See 7 U.S.C. § 181 et seq. This complaint is filed in the field offices of the Packers and Stockyards Administration. The office will investigate the complaint and the regional supervisor may then express his opinions to the parties orally or by letter as to whether respondent may be liable to pay the complainant. After this process, if the parties wish to litigate, the case is referred to the Office of General Counsel for a reparation proceeding. Records of the numbers of such mediations which have not been followed by reparation cases have not been kept in recent years. In fiscal year 1974, the number of mediation cases was approximately 600 which far exceeded the number of formal reparations proceedings.

Natural Resources Division. The agency conducts agency-initiated methods of dispute resolution under the National Forest System. The procedures for dispute resolution include appeals of decisions of forest officers under 36 CFR § 211.18. This is a broad informal appeals process which is applied in approximately 300 cases annually. Other rules of procedure include 36 CFR § 228.14 which is an appeals process available to mineral operators aggrieved by decisions in connection with the regulations governing locatable minerals and 36 CFR § 292.15 which is an appeals process for owners of private land within the Sawtooth National Recreation Area. A line officer of the Forest Service resolves disputes in each of these specified procedures.

Department of Commerce.

National Oceanic and Atmospheric Administration. The Office of the Secretary conducts a mediation of coastal zone management disputes under the Coastal Zone Management Act 16 U.S.C. §§ 1451 et seq. Under the Act, the Secretary of Commerce is authorized to mediate disputes between a federal agency and a coastal state concerning a coastal management program. The Act also authorizes the Office of Ocean and Coastal Resources Management to mediate where a state agency intends to object to a federally licensed activity. The mediation must be agreed to by all parties. It is used once or twice a year. The mediation is governed by 15 CFR part 930, subpart G. See also, 15 CFR § 930.124. If the mediation is not agreed to or fails, all parties have recourse to the courts. If informal mediation fails, formal appeal may be taken to the Secretary of Commerce.

The National Oceanic and Atmospheric Administration also administers the Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1401 et seq. with implementing regulations at 15 CFR part 980. Under this Act, U.S. companies seeking licenses to mine manganese must resolve all disputes involving overlapping mine sites. The administrator of NOAA may resolve these conflicts applying principles of equity. Under 15 CFR § 970.302 the administrator will encourage companies to resolve the conflicts voluntarily. The NOAA will then review any subsequent voluntary agreement. This method of dispute resolution has been used one time.

Office of Anti-Boycott Compliance. This office uses the procedures followed by the Office of Export Enforcement in all of its disputes.

Office of Export Enforcement. Under the Export Administration Act of 1979 50 U.S.C. Appendix 2410 the Office of Export Enforcement (OEE) issues an initial contact letter informing a party of its intention to issue a charging letter. The party may discuss the proposed charges with the OEE and attempt to reach a precharging letter settlement. This method is used approximately 50% of the time and results in settlement of the dispute 95% of the time. This settlement is governed by regulations at 15 CFR § 388.17(b). If the dispute is not resolved, the charging letter is issued. The consent agreement which results from this process is reviewed by the Deputy Assistant for Export Enforcement.

Personnel Law Division. The Division conducts arbitration of employee grievances under the Civil Service Reform Act, 5 U.S.C. § 7121. Arbitration has been used approximately eight times a year and is governed by regulations in 29 CFR § 1404 and Collective Bargaining Agreements.

Department of Defense.

The vast majority of dispute resolution mechanisms within the Department of Defense are not conducted pursuant to the APA. The following are the responses of the component agencies within the Department of Defense which use alternative forms of dispute resolution.

Army Corps of Engineers. The Corps of Engineers has made a significant effort to implement ADR into its decisional processes. It uses an intervening management level review to attempt to resolve contract disputes that would otherwise have to be resolved by resort to trial-type hearings before the Engineers Board of Contract Appeals. This informal review is called Division Review of Final Contracting Officer Decisions Made at the District Level. This review involves a document review and an informal hearing held by the division engineer or his deputy at which both the contracting officer and the contractor appear and present their views and arguments. The division review informal hearing process is used at the option of the division engineer. The process is used in about 1/4 to 1/2 of all contract dispute cases. There are no formal rules of practice or procedure for this review process. The hearing is informal and within the sole discretion of the division engineer who presides at these informal hearings. If the dispute is not resolved, the Engineers Board of Contract Appeals may hold a more formal hearing and subsequently render a decision. In at least one region, a panel of experts has been used to resolve controversies at the pre-litigation stage.

The minitrial has been used successfully by the Corps of Engineers to resolve several construction disputes, including one valued at more than $50 million (44 Fed. Cont. Rep. 501; 43 Fed. Cont. Rep. 257). Pursuant to its written policy statement, the Corps' minitrials have generally featured use of a private "neutral advisor" to preside over the proceeding and facilitate a settlement (44 Fed. Cont. Rep. 501). During the summer of 1986, the Corps held three minitrials involving overhead cost disputes between $2-5 million; two were settled, and issues were narrowed for trial in the remaining case. Charges that the settlement in the Corps' "Ten-Tom Constructors" minitrial was too generous to the contractor resulted in an Inspector General's investigation (46 Fed. Cont. Rep. 352) that vindicated the outcome. Several more minitrials were subsequently used.

Armed Services Board of Contract Appeals. All the appeals to the ASBCA may potentially result in hearings; however, ASBCA Rule 11 allows the parties to submit their case on a documentary record without a hearing. Additionally ASBCA Rule 12 provides for a faster decisionmaking process on truncated proceedings where the amount in controversy is $50,000 or less.

Navy Department. The Navy conducted three successful minitrials in allowable cost cases during the summer of 1986, involving disputed amounts in excess of $2 million. The Navy has also developed a policy to evaluate cases pending before the Armed Services Board of Contract Appeals for possible use of certain alternative. This new program was approved by Navy Secretary John Lehman on December 23, 1986. It is to be implemented on a test basis by all Navy contracting activities under guidance from the Office of the General Counsel. It provides guidelines for use of minitrials and other ADR procedures by which each contract dispute pending must be reviewed. Each party in a minitrial is to be given a specific amount of time to present its position before the principals who are authorized to settle the dispute. Parties to a minitrial may choose to have a neutral advisor present and the preferred source for them is the roster of ASBCA administrative judges. A "Summary Binding ASBCA procedure" is also offered, primarily for resolving large numbers of contract claims involving similar issues.

Office of Dependent Schools. The Department's regulations governing the education of handicapped students in a DOD dependent school make mediation a prerequisite to a due process hearing to resolve a dispute between the parents of a handicapped student and school authorities. 32 CFR § 57, Appendix II, ¶C2. School administrators who are usually not from the handicapped student's own school serve as mediators. If the mediation is unsuccessful, the parents or the school may petition for a due process hearing.

Department of Education.

Office for Civil Rights. Mediation is provided for under the Age Discrimination Act (42 U.S.C. 6101). Conciliation is also in use in cases of early complaint resolution, pre-letter findings negotiations, and statutorily-required voluntary negotiations under Title VI (42 U.S.C. 2000d), Title IX (20 U.S.C. 1681), and Section 504 (29 U.S.C. 794).

Division of Research & Improvement, Vocational Education and Rehabilitation. The Randolph-Shepard Act, 20 U.S.C. § 107 et seq. provides for the use of arbitration in the resolution of disputes concerning blind persons' priority in the operation of vending facilities on federal property. Blind vendors who are still dissatisfied with state action arising from the operation or administration of the program after being provided a full evidentiary hearing by the state may request the Secretary of Education to convene an arbitration panel to resolve the dispute. The three member arbitration panel issues binding decisions that are considered final agency action. The Rehabilitation Services Administration has developed procedures for convening panels and conducting arbitration. The procedures are contained in a policy issuance program instruction, 1SA PI 7817. They provide for a formalized evidentiary hearing including oral argument, examination, and cross-examination, as well as submission of written briefs. Disputes are handled through this arbitration mechanism whenever requests to convene panels are received. The RSA reviews panel decisions for consistency with federal law and regulations.

Education Appeal Board. The Department of Education is currently considering offering mediation to appellants who file appeals with the Education Appeal Board. The regulations governing the Education Appeal Board are found at 34 CFR part 78.

Department of Energy.

The Department of Energy's adjudications are non-APA adjudications. In one instance, however, DOE uses an alternative method of dispute resolution.

Economic Regulatory Administration. The administration generally employs informal administrative procedures in authorizing applications to import or export natural gas. These procedures include the use of public conferences, pre-hearing conferences, oral and written presentations, and opportunities for reply comments. The Economic Regulatory Administration almost always uses informal mechanisms in its consideration of natural gas import and export authorizations. Procedures are governed by 18 CFR, Chapter 1, but new rules have been proposed. The agency decides which procedures will be applied. The ERA administrator acts as the decisionmaker in the process. The ERA also, in certain instances, has required opposing parties to meet privately to resolve certain problems or to obtain additional factual information. Under this private sector mechanism, the ERA establishes the timetable under which parties will meet. This private sector mechanism has not been used frequently.

Energy Board of Contract Appeals. A minitrial was used in a large construction dispute during the summer of 1986. The minitrial, held following a five-week hearing but before issuance of a decision, successfully resolved the appeal in less than two days.

Federal Energy Regulatory Commission. Approximately 80% of the Commission's caseload is resolved through negotiated settlements. A settlement judge may be appointed when informal discussions have not been fruitful but one or more parties believes it is possible to settle the case. Settlement judges are appointed pursuant to 18 CFR § 385.603. This process is discussed at greater length in Daniel Joseph, *Use of Settlement Judges in Administrative Hearings* (a draft report to the Administrative Conference).

In addition, the Commission staff engages in a form of mediation in developing environmental conditions on licenses for hydroelectric generating plants. It also uses a form of mediation among interested parties in developing environmental impact statements and developing nationwide plans.

Nuclear Waste. The DOE is required to resolve disputes concerning the siting of nuclear waste repositories through a written agreement with the affected state or Indian tribe, arrived at through negotiation or arbitration. See 42 U.S.C. § 10131 et seq.

Department of Health and Human Services.

Within the Department of Health and Human Services, the Public Health Service, the Health Care Financing Administration, the Office of Human Development Services, and the Office of Community Services provide for a variety of non-APA adjudications. Informal dispute resolution, where it exists, has no predetermined procedures or personnel.

The Health Care Financing Administration, however, is required under 45 CFR § 201.6(c) to pursue informal efforts to resolve disputes with a state, before instituting a formal hearing. In addition, all the agencies with which the Health Care Financing Administration deals attempt to informally resolve disputes with grantees prior to the commencement of formal proceedings.

HHS is also required to publish regulations to provide for appropriate investigative, conciliation and conference procedures for the resolution of age discrimination suits in federally assisted programs. See 42 U.S.C. § 6101.

The Departmental Grant Appeals Board of HHS has established a mediation program. The process was modeled on one established by EPA which created a program in 1979. HHS's rule provides that the Board in consultation with the parties may suggest the use of mediation techniques and will provide or assist in selecting the mediator. The mediator may take any steps agreed upon by the parties to resolve a dispute or clarify the issues. The results of mediation are not binding upon the parties unless they so agree in writing. The Board will also provide people trained in mediation skills to aid in resolving a dispute that is not pending before the Board itself. At least seven cases have been heard under this process. (See *Model for Case Management: The Grants Appeals Board*, report to the Administrative Conference by Richard B. Cappalli (1986); Conference Recommendation 86-7: *Case*

Management as a Tool for Improving Agency Adjudication, Adopted December 5, 1986 1 CFR § 305.86-7.)

Department of Housing and Urban Development.

Bid protests under National Housing Act Contracts, 12 U.S.C. § 1701 et seq, 42 U.S.C. §3535(d) and 24 CFR Part 20 Subpart C, may be decided by the HUD Board of Contract Appeals upon written submission of the protester and procuring agent. This procedure is followed in all cases of bid protests under a National Housing Act Contract. The procedure is used in approximately 8 cases per year.

The Fair Housing Act of 1968, 42 U.S.C. § 3601 et seq directs the secretary to attempt to resolve all complaints under the Act through informal methods of conference, conciliation or persuasion.

Department of State.

The State Department uses of ADR include the following: (1) administrative settlement of tort claims under 22 CFR Part 31, (2) debarment or penalty proceedings under the Arms Export Control Act (22 U.S.C. 2778), resolved without oral hearing under 22 CFR 128.5, and 128.8, (3) preliminary adjudication of EEO complaints by applicants or employees in accordance with 29 CFR Part 1601, (4) contested requests for refund of annuity overpayments under 22 CFR Part 17 (subject to appeal to Foreign Service Grievance Board), and (5) disciplinary action against former officers or employees under the Ethics in Government Act in accordance with 22 CFR Part 18.

Department of Transportation.

Urban Mass Transportation Administration. The Department's Disadvantaged Business Enterprise Regulations require an UMTA recipient who is unable to meet a 10% goal to meet with a UMTA administrator to discuss how best to meet that goal. The UMTA currently is considering the possibility of encouraging private parties with complaints against UMTA recipients to try to resolve those disputes locally before involving UMTA.

Office of Civil Rights. The Office uses alternative methods of dispute resolution in considering participation by minority business enterprises in Department of Transportation programs. Any firm which believes that it has been wrongly denied certification as a minority business enterprise may file an appeal with the Department of Transportation. This appeal is governed by regulations in 49 CFR § 23.55. The Secretary of Transportation serves as fact finder over these cases with delegation to the Departmental Director of Civil Rights. Approximately 180 cases are handled per year in this program.

The DOT also encourages recipients of financial assistance to establish procedures for hearing appeals of denials of minority business enterprise certification. These recipients are usually local or state governments. This non-federal mechanism is not widely used. Perhaps less than 10 recipients have established their own procedures for hearing these appeals. The recipients who have established such a procedure address a rather high number of cases -- possibly 150 to 200 per year. The Department of Transportation does not monitor the operation of these hearings. Businesses denied certification maintain the right to file an appeal with the Department when they are dissatisfied with the results of recipient's hearings.

National Highway Traffic Safety Administration. Where the agency believes civil penalties may be appropriate for violations of the Motor Vehicle Information and Cost Saving Act, 15 U.S.C. § 1981-1991, or the Federal Motor Vehicle Safety Standards promulgated under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1392, NHTSA has developed procedures for informal resolution without resort to an agency hearing. The procedures are not incorporated by the agency in its regulations. Generally the agency sends the manufacturer a notice letter advising it of the agency's view that a violation exists and of the possible liability for civil penalties. This letter informs the manufacturer that it has the opportunity to submit data to use in arguments that would show that the violation did not occur and/or that there is a reason to mitigate the amount of the penalty. The agency then considers the information submitted by the manufacturer and arrives at what it views as an appropriate civil penalty amount. Further negotiations may proceed before the final figure is established. From August 1982 to August 1983 the above procedures have resulted in the collection of $146,000 in penalties for 11 standards enforcement cases and a total of $9,000 for nine odometer cases.

Environmental Protection Agency.

EPA has recently promulgated guidance encouraging use of ADR in enforcement cases. The guidance, drafted by the Office of the Enforcement and Compliance Monitoring, has criteria for evaluating cases' susceptibility to various kinds of ADR, and includes forms, procedures and model agreements. It also lays out procedures for obtaining agency approval to use various ADR methods in particular cases.

In the area of hazardous wastes, Section 3013 of RCRA authorizes EPA to issue orders requiring parties to conduct testing or monitoring of hazardous waste sites or facilities. Section 106 of the Superfund authorizes EPA to issue orders requiring parties to take action necessary to protect the public from the dangers associated with the release of hazardous substances. Recipients of either type of order may take advantage of the opportunity to informally confer with the agency concerning the terms of the order. There are no set procedures governing the conduct of the proceedings. In 1983 there were 15 Section 3013 orders and 26 Section 106 orders issued. The selection of presiding officers for this proceeding has not been standardized.

Under the Superfund program, arbitration may be used to resolve federal claims where the total response costs for the facility involved do not exceed $500,000. Arbitration is to be conducted under EPA rules issued after consultation with the Attorney General.

Arbitration is also authorized by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 which requires the use of arbitration to establish the compensation due for one applicant's use of prior submitted data in an application for registration of a pesticide. 7 U.S.C. § 136(a).

Equal Employment Opportunity Commission.

Under 42 U.S.C. § 2000-e-5(b) the EEOC is authorized to attempt to eliminate alleged unlawful employment practices by informal methods of conference, conciliation and persuasion.

Federal Communications Commission.

The FCC uses several agency-initiated alternatives to dispute resolution.

Mediation. A mediator/facilitator was used in 1986-87 to help settle a controversial dispute involving disposition of several televisions stations.

Paper hearings. Under 47 U.S.C. § 309e, the FCC may conduct paper hearings in situations where there are competing applicants for low power television service. To date, none have been conducted. The rules of practice governing these hearings are found at 47

CFR § 1.241a. If the Commission cannot resolve the controversy, a regular trial-type hearing is conducted.

Expedited hearings. Under 47 U.S.C. § 309e the Commission may conduct expedited hearings involving basic qualifying issues for competing applicants for cellular radio service facilities. The FCC reports that this procedure basically involves strict adherence to a hearing schedule already prescribed by the rules. The rules governing this expedited hearing are found in 47 CFR §§ 22.916 and 22.917.

The FCC also provides for private sector mechanisms for some licensees who are encouraged to resolve electrical interference problems without the Commission's intervention. Absent industry cooperative efforts the resolution of these interference issues would trigger agency proceedings. The agency does not keep detailed information about the exact measures taken by communications industries in private sector negotiations. The agency also does not review measures negotiated and placed into effect through private action. The agency's Field Operations Bureau does monitor and reinforce the effectiveness of these measures.

Federal Election Commission.

Under 2 U.S.C. § 437(g), if upon investigation of a complaint or upon its own initiative the FEC concludes a violation of federal campaign laws has occurred, the FEC has 30 days to make every effort to conciliate a resolution of the violation. Any resulting conciliation agreement will conclude the FEC's interest in the matter. If informal dispute resolution methods fail, the FEC may file a civil action.

Federal Emergency Management Agency.

The agency uses alternative methods of dispute resolution in two instances. (1) FEMA uses arbitration under the Urban Property Protection and Reinsurance Act, 12 U.S.C. §1749(b). The procedures are set forth in 44 CFR § 56.37. No cases have been brought under this Act to date. (2) FEMA uses standard dispute resolution techniques in such matters as equal opportunity cases, adverse actions, performance ratings, and Merit Systems Protection Board cases.

Federal Labor Relations Authority.

Title VII of the Civil Service Reform Act of 1978 established the Federal Service Impasses Panel as an entity within the FLRA. This panel is to provide assistance in resolving negotiation impasses between federal agencies and exclusive representatives of federal employees. The Impasses Panel is not required to use any particular procedure in the resolution of negotiation impasses. The Panel has broad authority to fashion procedures appropriate to resolve disputes and does so on a case-by-case basis. The following are the most often used procedures.

Factfinding. Factfinding involves a hearing before a Panel member or a Panel designee the purpose of which is to establish a complete record of the issues in dispute and the positions of the parties. This involves a trial-type hearing after which the Panel issues its own settlement recommendations or it may issue a binding decision.

Written submissions. This procedure does not involve a hearing. The parties exchange written statements of position and supporting evidence and may subsequently exchange rebuttal statements. After consideration of the written material the Panel may make recommendations for settlement or issue a binding decision.

Arbitration. The Civil Service Reform Act of 1978 authorizes the parties to voluntarily submit their dispute to an independent arbitrator after the procedure has been approved by the Panel.

Med-Arb. When med-arb is used a neutral is given the authority to both mediate the dispute and make a binding award on those issues not resolved during the mediation. This procedure often leads to a resolution without the neutral having to issue a decision.

The Federal Service Impasses Panel makes the decision as to which procedures will be used to resolve a dispute. To date, factfinding has been directed 14 times, written submissions have been employed 42 times, outside arbitration has been recommended in 14 cases and the med-arb procedure has been used in 20 cases. The Impasse Panel's regulations governing factfinding hearings can be found in 5 CFR Parts 2470 through 2472. There are no published rules or procedures applicable to the other procedures. Factfinding hearings are held by a panel member or a panel designee. There is no designated representative when written submissions are used. Outside arbitration is conducted by a panel designee or a person chosen by the parties. Each of these procedures will result in a final and binding decision unless the parties have negotiated a settlement.

Federal Maritime Commission.

The Commission uses several alternative methods for resolving disputes without resorting to formal hearings.

The Commission uses an informal procedure for adjudication of small claims -- those claims for less than $10,000. The proceeding is conducted under the APA by a settlement officer and by the Secretary of the Commission. The record consists of written evidence and arguments. The decision of the settlement officer is not subject to appeal by the parties but may be reviewed by the Commission on its own motion. The parties, however, may seek review in federal court. The regulations governing this informal procedure are found at 46 CFR § 502.301.

The Commission uses a shortened adjudicatory procedure conducted before an ALJ. The proceeding is limited to the submission of memoranda, facts and arguments. The parties must consent to this procedure which is used frequently.

The Commission has also used a non-adjudicatory fact finding investigation. These investigations are conducted by agency personnel designated by the Commission. The regulations for this investigation procedure are found at 46 CFR § 502.281.

The Commission also has a conciliation service. The regulations are found at 46 CFR § 502.401. This conciliation service is rarely used. This dispute resolution mechanism is applied when all parties consent to the conciliation service. The parties must also consent to any opinion developed as a result of the conciliation service.

The Commission also develops compromise agreements in its application of civil penalties. The Commission's Bureau of Hearing Counsel is authorized to assess penalties, enter into negotiations and reach a compromise with the person involved and to obtain payment of the penalty. Any compromise agreement is executed between a party and the Director of the Bureau of Hearing Counsel. The regulations covering this procedure are found at 46 CFR § 505.4. If agreement cannot be reached on the terms of a civil penalty, the matter is referred to the Commission for a formal proceeding.

The Commission also oversees two private sector mechanisms for dispute resolution. First, the Commission oversees a selfpolicing mechanism used by shipping conferences or other ratemaking associations under Section 15 of the Shipping Act of 1916 found at 46 U.S.C. § 14. Under this mechanism a neutral body investigates alleged violations of agreements by members of the conferences or ratemaking associations and determines if fines are merited. All conferences or ratemaking associations of more than two members are required to employ such self-policing mechanisms and to report to the Commission periodically on their activities. The Commission does not generally review decisions of the neutral bodies.

Second, shippers may also file complaints with conferences and other ratemaking bodies concerning the rates and practices of the conferences. The procedure is required by Section 15 of the Shipping Act, 46 U.S.C. § 814 and by 46 CFR Part 527. If the conference does not respond favorably to a request, the complaining party may file a formal complaint with the Commission.

Federal Mediation and Conciliation Service.

The function of the Federal Mediation and Conciliation Service is to assist parties to labor disputes through conciliation and mediation. The Service's mediators, located across the country, are utilized in disputes which significantly affect commerce. FMCS also mediates complaints brought under the Age Discrimination Act. During the 1970's, FMCS worked with various federal agencies in the non-labor relations arena, mainly through its Office of Technical Services. The efforts included: (1) work with the Community Relations Service of the Department of Justice regarding civil rights disputes, (2) FBI police training assistance in domestic disputes and hostage taking, (3) helping the Department of Commerce's, Science and Technology Division in disputes over voluntary standards for manufactured products, (4) providing mediation training to the Law Enforcement Assistance Administration and the Equal Employment Opportunity Commission, (5) mediation of age discrimination disputes, (6) helping the Office of Environmental Planning of the Federal Highway Administration in training in negotiation skills for conflicts resulting from the condemnation of property and exercise of eminent domain in the construction of highways, (7) providing training assistance to the Veterans Reemployment Office of the Department of Labor, the Office of Civil Rights (then located in the Department of Health and Human Services), and the Department of Housing and Urban Development, and (8) providing conflict resolution advice to the Division of Standards of the Environmental Protection Agency, the Environmental Office of the Department of Energy, and the Council on Environmental Quality.

During the early 1980's, nearly all FMCS non-labor related activities, except for the age discrimination mediation program, ceased due to budget cuts.

Federal Reserve System.

The Federal Reserve System processes consumer complaints against state member banks and forwards any complaints it receives against other creditors or businesses to the appropriate state or federal enforcement agencies. In 1982 the System received 2,840 complaints of which 1,226 were against state member banks. The Federal Reserve banks respond to these complaints in writing. The Federal Reserve Board monitors the complaint resolution process by periodically reviewing complaint investigations and responses and complaint handling activities of the Federal Reserve Banks.

Federal Trade Commission.

The Magnuson-Moss Warranty Act is administered by the FTC and encourages warrantors to establish procedures to resolve disputes concerning warranties. The FTC then supervises a dispute resolution mechanism (DRM) that operates as a part of a private organization. The act requires the FTC to issue rules prescribing the minimum requirements for a DRM to which a complaining consumer must first turn before proceeding to court. Some states have passed "lemon laws" going beyond FTC's minimal procedures.

On September 19, 1986, the Commission initiated a negotiated rulemaking proceeding for the purpose of amending the Rule on Informal Dispute Settlement Procedures, 16 CFR Part 703. Rule 703 establishes the minimum standards for any informal dispute settlement mechanism that is incorporated into a written warranty pursuant to Section 110(a) of the Consumer Product Warranties (Magnuson-Moss) Act, 15 U.S.C. § 2310(a). The Commission has established an advisory committee to develop, through negotiation, specific recommendations for amending Rule 703. The advisory committee has divided itself into three "working groups" on program neutrality, independence, and access; program procedures; and enforcement and compliance issues.

Additionally, the Better Business Bureau operates a program for processing disputes over some automobile warrantees, pursuant to a consent decree with General Motors Corporation in settlement of its allegation that GM failed to notify customers of high failure rates of certain auto components. The Commission agreement with GM established a DRM (BBB) to determine whether a car is afflicted with these problems and what should be done. The BBB first seeks to mediate an agreement between the dealer and the customer, with the issue being arbitrated if mediation fails. The Commission's Enforcement Division of the Bureau of Consumer Protection monitors General Motors' compliance with the order on an ongoing basis, *GM Corp.*, 102 F.T.C. 1741 (1983).

General Accounting Office.

The GAO provides an alternative to trial-type dispute resolution in its Bid Protest Forum which is described in 4 CFR Part 21. This Forum handles approximately 1,000 cases each year. An attorney with GAO writes the initial draft decision. All final decisions are signed by the Comptroller General.

The GAO uses alternatives to trial-type hearings in settling doubtful claims and in considering advance decisions. See 31 U.S.C. § 711, 31 U.S.C. 3529 and 31 U.S.C. § 3702. The agency chooses when to use alternative procedures. Such procedures were used in fiscal year 1982 in rendering approximately 1,000 advance decisions and in determinations of accountable officers' liabilities. In the claims area the GAO handled 1,000 waiver requests, 7,241 claims by the U.S. and 2,400 claims against the U.S. The procedures are set forth in 4 CFR Ch. I, parts 22, 30-35, 53, 91-93, Ch. II, parts 101-105. Claims are handled by claims examiners, with appeals taken to attorneys in the Office of General Counsel. Individuals dissatisfied with GAO actions may appeal to the courts.

Interstate Commerce Commission.

Most of this Commission's cases are decided through its modified procedure whereby the agency decides a case exclusively on written submissions under the APA. The Commission's Office of Proceedings prepares all modified procedure decisions.

Merit Systems Protection Board.

The MSPB was created to protect the federal merit system from political abuse and to resolve employee grievances. Its enabling legislation (Civil Service Reform Act of 1978), encourages the board to provide for ADR. The Board began in 1983 and 1984 with an experimental voluntary expedited procedure. With the assistance of the Administrative Conference, the MSPB developed the "Appeals Arbitration Procedure" (AAP), later modified as the "Voluntary Expedited Appeals Procedure" (VEAP) to reduce the confusion of the AAP with labor arbitration and to emphasize the parties right of choice. (See, MSPB Practices and Procedures, Section 1201, Subpart H) The Board's objective was to design an informal, simplified, less costly system to adjudicate routine, non-precedential appeals while preserving fair, impartial forums. While this experiment had only limited results, the mediation emphasis it included has led to increased settlements in some regional offices.

The MSPB recently established a committee to consider the use of mediation and ADR. Both mediation and conciliation are under consideration for greater use by the regional offices, and some regions have already increased the incidence of settlements using these techniques.

National Mediation Board.

The Railway Labor Act, 41 U.S.C. § 151 et seq. created the Board to settle railroad/employee disputes. If mediation fails, the Board is to induce the parties to enter arbitration. Arbitrators are selected under procedures found in 45 U.S.C. § 157.

Nuclear Regulatory Commission.

The NRC has experimented with the use of informal procedures in its licensing proceedings. On several occasions the Chairman of the Atomic Safety and Licensing Board Panel has selected a member of the Panel to act as a presiding officer. This presiding officer may allow parties to present oral arguments at his discretion. An order may be issued by the Commission based upon written comments received by the presiding officer. Regulations have not yet been developed to govern this type of informal dispute resolution. The Commission's authority to conduct these informal proceedings is found in 42 U.S.C. § 2239.

Occupational Safety and Health Review Commission.

OSHRC has promulgated rules governing negotiations before a settlement judge. (29 CFR § 2200.101) Any party to certain proceedings may move for appointment of a settlement judge, or the Chief ALJ or Chairman may appoint one with the consent of the parties.

Office of the Federal Inspector, Alaska Natural Gas Transportation System.

This agency oversees the construction of the Alaska Natural Gas Transportation System. The agency employs informal dispute resolution mechanisms in its determination of ratebased decisions and in its investigation of claims of racial discrimination. The procedures are set forth in 46 Fed. Reg. 51726 and Enforcement Procedures for Equal Opportunity Regulations, 10 CFR Part 1534. The agency attempts to resolve disputes through conciliation, however, if matters are not resolved the Federal Inspector has the final decision.

Pension Benefits Guaranty Corporation.

The PBGC has an appeals board which has the discretion to grant an oral hearing, however no such hearing has ever been held. The board handles approximately 250 cases per year. The board's procedures are found at 29 CFR § 2606.52 et. seq.

The PBGC has two alternatives to the appeals board, reconsideration and informal review. An aggrieved party may request reconsideration of a PBGC staff decision. This reconsideration will be undertaken by a person of higher authority than the original decisionmaker. The procedures for reconsideration are found at 29 CFR § 2606.31 et seq. The decision to request appeal or reconsideration depends upon the type of determination made. The PBGC makes over 900 reconsiderations per year. A person dissatisfied with the result of a reconsideration may sue in court.

The second informal procedure used by the PBGC is an informal review process under 29 CFR § 2606.1(c).

The (MPPAA) Multi-employer Pension Plan Amendments Act of 1980 (P.L. No. 96-364, 94 Stat. 1217, codified at 29 U.S.C. (1381 et. seq.) amended the (ERISA) Employee Retirement Income Security Act of 1974 (P.L. No. 93-406, codified at 29 U.S.C. § 1001 et. seq.) to impose liability upon any employer that withdraws from a multiemployer pension plan. (A multiemployer pension plan is one which is maintained under collective bargaining agreements and covers employees of two or more employers. Employers contribute to the plan fund, which are paid into a pooled fund administered by trustees designated by employer and union.) MPPAA required pension plan sponsors and withdrawing employers to arbitrate disputes over the amount of an employer's withdrawal liability (29 U.S.C. § 1401). As originally enacted the employer's obligation to the plan ceased upon withdrawal. MPPAA created withdrawal liability to prevent employers from withdrawing and leaving the plan from being obligated to pay the benefits from the reduced pension fund pool. Any dispute that arises concerning any determination made by the plan sponsor is resolved through arbitration. The Act directs the PBGC to promulgate rules governing the conduct of the prescribed arbitration. The final rule was published on August 27, 1985 (50 Fed. Reg. 34679).

Postal Rate Commission.

The Postal Rate Commission currently follows a complaint case procedure set forth in 39 CFR § 3001.85. The Commission, however, has a proposed rulemaking [check status] which would amend its current procedure to include a provision that would allow the Commission to use informal inquiry methods to resolve complaint cases. Under this proposal, the Commission may choose to conduct a preliminary investigation before filing a formal answer in a complaint case. Under this proposal, a Commission employee would act as a facilitator of a pending dispute. If the informal inquiry method did not resolve the dispute, a formal complaint case would proceed.

Railroad Retirement Board.

The board's adjudications are non-APA adjudications. The agency, however, has proposed using a board of real estate appraisers in resolving disputes concerning a value of a home under the Railroad Retirement Act. See 45 U.S.C. § 395.8(d). The board has also considered using a similar mechanism to resolve benefit disputes under the Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. § 1001 et seq.

Securities and Exchange Commission.

The SEC does not employ any alternative methods of dispute resolution. However, the Commission does in 17 CFR § 202.5C provide for a procedure by which the subject of a Commission investigation may submit a written statement to the Division of Enforcement explaining why no enforcement action should be brought against him.

Additionally, the SEC has encouraged the security industry's self-regulatory organizations to adopt a uniform code of arbitration. This arbitration is available for resolution of certain disputes between broker/dealers and their customers. The Commission also relies on the self-regulatory organizations to discipline their members for violations of security laws and the regulatory organization's own rules. This practice is authorized by Sections 6(b)6, 15a(b)(7) and 19(g)(2) of the Exchange Act of 1934.

3. GOVERNMENT ADR POLICIES AND PRACTICES

B. Descriptions of Specific Initiatives

THE FEDERAL MEDIATION AND CONCILIATION SERVICE

Mr. Kay McMurray, Director

Mediation is an established process for resolving disputes between individuals or groups who sincerely seek a peaceful solution to their differences. Mediation represents an alternative to the use of force.

The mediator is a neutral third party whose methods and practice may vary because of the individual approach to mediation or the circumstances of a specific negotiation. It is the mediators function to listen, review, analyze, reason, explore and suggest possible ways and means of movement with both parties to generate a basis for reaching agreement.

The Federal Mediation and Conciliation Service is an independent agency of the Federal Government that uses mediation and other techniques to promote labor mangement peace. The Service was established by the Labor-Management Relations Act of 1947.

Our specific mission is to prevent or minimize labor-management disputes having a significant impact on interstate commerce or national defense throughout the nation, both in the private and public sectors of the economy, excepting in the railroad and airline industries.

The Office of Arbitration Services, located in the Washington D.C. National Office of FMCS, maintains a roster of qualified arbitrators who are located in all parts of the country. When parties to a dispute require a third party decision they may jointly request a panel from which to make their choice. The Office of Arbitration Services will then select by tandom method a list of arbitrators available to hear the dispute.

FMCS has also provided assistance to other agencies in dispute resolution and other types of mediation services. The Service has mediated Environmental Protection Agency, Department of Transportation and Department of Labor negotiated rulemaking cases. We have provided mediation training and technical assistance to several other agencies.

If you have any questions about FMCS involvement, call our Legal Counsel, Daniel P. Dozier at 653-5305.

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The FMCS contribution to nonlabor dispute resolution

During the 1961–80 period, the Federal Mediation and Conciliation Service shared its expertise with parties outside the labor-relations arena; results demonstrate the promise of mediation for the speedy, low-cost resolution of many different types of economic and social conflicts

Jerome T. Barrett

Four formal procedures—litigation, arbitration, negotiation, and mediation—are commonly used for the legitimate resolution of disputes between individuals or groups. In litigation and arbitration, a third party is empowered to decide the issue in question. Negotiation has the advantage of allowing the parties to participate fully in developing a solution with which each can live. Mediation blends the advantages of the other three methods, employing an objective third party, but leaving the decision on the outcome to those who must abide by it.

Since its establishment in 1947, the U.S. Federal Mediation and Conciliation Service (FMCS), the oldest and largest mediation agency in the world,[1] has acquired considerable expertise through the resolution of labor-management disputes. During the past two decades, the Service increasingly shared its skills by helping to resolve disputes outside the private-sector industrial relations arena. This article reviews the recent contributions of the Service to problem resolution in nontraditional areas. The discussion is based on FMCS documents, interviews with mediators and recipients of Service assistance, and the author's own experience as former head of the staff involved in the expanded scope.

Testing new waters

Prior to the appointment of William Simkin as director of the FMCS in 1961, the Service had not worked beyond its legislative mandate in private-sector labor-management relations. The emergence of public employee unionism in the 1960's changed this.

Although the Service lacked legislative authority to handle disputes between public employees and their employers, no other organization was available in most instances to provide assistance. In response to public pressure and the urgent requests of the parties, the Service began providing mediation on a case-by-case basis. Because many of these public employee disputes in large cities were civil rights disputes as well, the Service was drawn further afield from its usual work into new and unfamiliar areas.

J. Curtus Counts, who followed Simkin as FMCS director in 1969, continued the policy of *ad hoc* mediation of public employee disputes, but otherwise made no changes in the mission of the Service. However, the appointment of William Usery to the post in July 1973 ushered in what was to be a major growth period for the agency. By strongly urging an expanded role for the Service, Usery persuaded the Administration and the Congress to increase his staff and budget accordingly.

In 1973, Usery's plans for the Service led him to create the Office of Technical Services within the agency's national

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office. This office was to coordinate and promote technical assistance cases, conduct an improved professional development program for the mediators, provide a technical information and research function to assist the field mediator, and experiment with new uses of mediation. During the 4 years of its existence, the office was the focal point of an increasing amount of non-labor-relations work within the Service.

In early 1974, Usery convened a 3-day meeting of all Service managers to discuss the agency's role. The major result was the adoption of a five-part mission statement. While four parts specifically referred to labor-management relations, the fifth envisioned an expanded role in "[d]eveloping the art, science and practice of dispute resolution." This mission statement remains in effect today.

During the oil crisis in 1974, Director Usery personally became involved in some non-labor-relations disputes between independent truckers and oil companies, and between independent gas station operators and the oil companies. In the same year, the Service undertook what is probably the most noteworthy example of nontraditional mediation, the settlement of a longstanding dispute between two Indian tribes.

The Hopi–Navajo dispute. Geographically the largest Indian reservation in the United States, covering 2½ million acres in northeastern Arizona, the Hopi–Navajo reservation had been created by executive order in 1882. There followed years of disagreement over land use by the two tribes, during which many traditional dispute-resolving procedures were used with only partial and temporary success. In 1974, Congress enacted a statute directing the FMCS to try to mediate the dispute.

Accordingly, the Service hired former Director Simkin as principal mediator for the project. Congress appropriated $500,000 to finance the mediation, and $50 million was made available to other Federal agencies to help implement the settlement by relocating fences, villages, families, burial grounds, and monuments. If settlement were not fully achieved within 6 months, the mediator was to make a report with recommendations to the Federal District Court.

After months of work by the mediation team, supported with information from other government agencies, agreement was reached in principle on most issues. The mediators' report and recommendations to the Federal Court were adopted and enforced by the terms of a March 1977 ruling. However, because many questions remained on the implementation, the court and the tribes requested that the mediation effort continue. For the next year, Simkin continued to help the parties on an as-needed basis.

The success of this mediation effort was praised by the court, the tribes, the Bureau of Indian Affairs of the Department of the Interior, and the media. The length of the dispute, the sacred nature of some issues, the uniqueness of the Indian culture and habits, and the failure of the numerous prior efforts to settle the problem all had contributed to the difficulty of the mediation project. But unlike the earlier efforts—treaties, litigation, court orders, executive orders, and acts of Congress which produced answers to narrow questions—mediation allowed the parties to deal with their needs and desires, and in that way to develop solutions with which they both could live.

The Home Owners' Warranty program. Another extensive project begun during the Usery directorship involved the Home Owners' Warranty (HOW) program of the National Association of Home Builders. The HOW program was started in 1973 as a method of formally resolving disputes that arise between home builders and home buyers. The program, provided under a warranty, used mediation and arbitration to resolve differences. Before HOW was created, the National Association of Home Builders came to the FMCS for advice and assistance.

The Service provided numerous suggestions on how the program might work, and extensive help in preparing and conducting more than 20 training sessions for HOW staff throughout the country during 1973 and 1974. Once the program was operating, technical advice was offered to HOW conciliators who encountered mediation problems. And in 1976, when the Federal Trade Commission issued rules on warrantys and guaranties under the newly passed Magnuson–Moss Bill, the Service assisted HOW in getting approval from the commission for the program to operate as an experiment under the new rules. Without this approval, HOW mediators trained by the FMCS would have become ineligible to participate in dispute resolution.

The Oglala Sioux election. Former Deputy Director James Scearce became Director of the FMCS in the spring of 1976. As Deputy, Scearce had acted as the liaison with the Bureau of Indian Affairs and other Federal agencies during the Hopi–Navajo mediation effort. As a result of these contacts, the Oglala Sioux Tribe of Pine Ridge Reservation in South Dakota contacted Scearce in 1975 to discuss its need for a neutral organization to oversee a tribal election. (The previous election had been hotly contested and the results controversial.) After considerable discussion—and an urgent request from the Bureau of Indian Affairs—the Service agreed to help.

The Pine Ridge reservation, geographically the second largest in the country, was home to 12,000 tribal members and 3,500 non-Indians. Twenty-one polling places were needed to cover its 2 million acres. The Service was to oversee the election conducted by the tribal election board by developing the election rules and procedures, training the election judges and observers, and providing a trained election adviser at each polling place during the primary and general elections. These advisers were FMCS mediators and retirees from the Department of Labor and the National

Labor Relations Board who were selected by and who worked under the direction of the Service.

Both elections were held without major problems during January 1976.[2]

Federal agencies. A number of Federal agencies also requested help from the Service during the tenure of Usery and Scearce. A few examples will illustrate both the types of requests and the Service's responses.

- *Community Relations Service (CRS).* The CRS is a branch of the U.S. Department of Justice charged with mediating civil rights disputes. During 1973–79, FMCS helped develop position descriptions for its mediators, conducted a number of training sessions for the mediators, developed an internship program, and arranged for liaison between field mediators of the two agencies in cases involving both civil rights and labor relations.
- *Federal Bureau of Investigation (FBI).* The FBI training facility in Quantico, VA, conducts training for State and local police officers. At the Bureau's request, the FMCS in 1975 critiqued training sessions and instructional materials intended to aid officers in dealing with domestic disputes and hostage taking. The Service also helped develop suggestions for nonviolent response to these explosive situations.
- *Department of Commerce.* Between 1976 and 1980, the Service helped the Science and Technology Division of the Commerce Department develop a system to resolve disputes over voluntary standards for manufactured products.
- *Law Enforcement Assistance Administration* and *Equal Employment Opportunity Commission.* The Service provided mediation training to the staff of both agencies.

The Washington Lab. During much of the 1973–77 period, the Service's Office of Technical Assistance responded to the many opportunities in the Washington, D.C., area to provide assistance in resolving nonlabor disputes. This was a mutually beneficial arrangement—the parties were guided toward long-term solutions for their problems, and the Service got the opportunity to experiment and apply its skills in new areas. The range of Service activities included: 1) mediating a racial dispute within the District of Columbia fire department; 2) setting up a procedure for settling disputes between landlords and tenants in the District, and mediating several cases to help get the system working; 3) mediating a racial dispute between custodians and teachers in the Arlington County, VA, schools; 4) working behind the scenes with the Environmental Protection Agency, the Steelworkers union, and an interested citizen group on a proposed District of Columbia City Council ordinance banning the sale of beverages in cans; and 5) training the staff of the Montgomery County, MD, Consumer Complaint Office in negotiation and mediation skills.

The later years

Wayne Horvitz, who became Director of the FMCS in April 1977, was acquainted with nontraditional mediation, having spent 2 years as a consultant to the National Center for Dispute Settlement during the late 1960's. During his tenure, the first continuing use of FMCS mediators in non-labor-management cases began with age discrimination disputes. Under the Age Discrimination Act of 1975, discrimination on the basis of age is prohibited in programs and activities that receive Federal funds. Responsibility for enforcing the Act was assigned to the Secretary of Health, Education, and Welfare (HEW). Following months of discussion and planning, the FMCS and HEW developed a system for handling these cases that featured mediation. The uniqueness of this system was emphasized by HEW Secretary Califano in a 1978 speech on aging:

> We propose, for the first time in the history of civil rights enforcement, to enlist the Federal Mediation and Conciliation Service to review claims of discrimination and resolve them, within no more than 60 to 90 days. No other civil rights program in our government employs such a process of third party mediation. But perhaps, in time, every one of our civil rights programs should feature such a mediation process.[3]

FMCS used the introduction of this program to test a modified "assessment center" concept for recruiting, selection, and training.[4] An evaluation phase was conducted using an innovative case handling system: In one-half of the Service's regional offices, the cases were mediated by specially trained FMCS mediators who also continued to handle their normal labor-management caseloads. In the other regions, individuals from outside the agency were selected to mediate on an as-needed basis. These persons, called community conciliators, were recruited and trained through various community-based mediation centers.[5]

During the first 18 months of the program, the Service handled a total of 94 age discrimination cases, with 55 percent requiring no further action after mediation.[6]

Helping other Federal agencies. The Horvitz directorship was characterized by an increase in the amount of non-labor-management work done by the Service for other Federal agencies. One such effort involved the Office of Environmental Planning of the Federal Highway Administration (FHA), which contacted FMCS in the spring of 1979 to discuss its need for training in negotiation skills. The employees of FHA and their State counterparts were involved in the condemnation of property and the exercise of eminent domain in the construction of highways, activities which often give rise to conflict. After discussions over several months, an agreement was reached between the two agencies providing for the detailing of two mediators to learn more about environmental disputes and the work of the FHA, and several week-long training programs by FMCS covering a variety of dispute-resolving methods such as negotiating, prioritizing, consensus building, and problem solving.[7]

The Service also received requests for training assistance from a number of other agencies which had concluded that their programs would be helped by having a staff more skilled in conflict resolution. Among these agencies were the Veterans' Reemployment Office of the Department of Labor, the Office of Civil Rights of the Department of Health and Human Services, and the Department of Housing and Urban Development. Some agencies simply sought advice on how to systematically deal with conflicts. Although staff time limited the number of requests which FMCS could satisfy, such help was given to the Division of Standards and Regulations of the Environmental Protection Agency, the Environmental Office of the Department of Energy, and the Council on Environmental Quality within the Executive Office of the President.

Non-Federal work. Although the emphasis during the Horvitz directorship was on helping Federal agencies, some assistance was given to other organizations. A few of these cases, discussed below, will demonstrate the nature of these Service efforts.

In 1979, FMCS and the Home Owners Warranty (HOW) program staff cooperated to create the National Academy of Conciliators to assume responsibility for administering the HOW program and to provide other dispute settlement services. Over the next 2 years, the Service gave extensive assistance to the Academy in developing its staff. Since its establishment, the Academy has served more than 30 clients in dispute settlement work, and continues to increase its role and impact in new areas of dispute settlement.

In 1978–79, the Service provided assistance to the Family Mediation Association, a nationwide organization of lawyers, psychologists, marriage counselors, social workers, and clergy. Since its establishment, the Association had typically employed a very formal and structured form of mediation in its sensitive and important work. At the request of some Association members, FMCS undertook a cooperative training and consultation program, which ultimately resulted in some modification of the formal mediation techniques.

In a 1980 case, the Attorney General of Alaska requested FMCS assistance in developing a dispute settlement system for land use problems. A new State law required local governments to clear their land use plans with the Alaska Coastal Management Council. The Council wanted to adopt a dispute settlement system that could resolve conflicts among local planners, natives, and land resource developers. A State Assistant Attorney General met with FMCS in Washington, D.C., to discuss a system that would include Service participation. A mediator then traveled to Alaska to meet with the Council and to discuss the system and the FMCS role in it. The Council adopted the system, which designated FMCS to select and assign mediators as disputes arose.

In a final example, the FMCS was asked to serve in an advisory capacity on a project funded by the Department of Education and administered by the National Association of Social Workers. The intent of the project was to apply mediation techniques to conflicts arising from a law requiring the educational mainstreaming of handicapped children within public school systems. During 1979–80, the Service provided advice and suggestions to, and shared instructional materials and training strategies with, the director of the mainstreaming program.

Mediators carry on the tradition

Because of budget cuts in 1981 and 1982, all Service involvement with nonlabor work was stopped, except for a small program dealing with age discrimination mediation. However, interviews conducted by the author with FMCS field mediators during 1983 revealed that many of them continue to initiate their own work in the nonlabor field, motivated by personal interest, opportunity, community involvement, feelings of professional responsibility, or intellectual curiosity. The range of activities reported by these mediators includes providing general or specific information about mediation; providing training; helping to develop dispute settlement systems; and the actual mediation of cases. Examples of recent projects undertaken by interviewees provide evidence of the value of mediation to such diverse entities as governments, communities, universities, minority groups, troubled families, and even to the Nation's judicial system. It is noteworthy that most of the mediators who reported taking on nonlabor cases enjoyed the work and intend to continue their involvement in some capacity.

CERTAINLY, the use of nontraditional mediation has increased greatly during the past 10 years. Given the experience of FMCS in mediation, and its demonstrated willingness to share that expertise, there is no doubt that the Service contributed immeasurably to the evolution and spread of this highly effective, low-cost means of conflict resolution. ☐

——FOOTNOTES——

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[1] Through its predecessor organization, the U.S. Conciliation Service, the FMCS can trace its history to the creation of the U.S. Department of Labor in 1913.

[2] Federal Mediation and Conciliation Service, "Report on the 1976 Primary and General Election of the Oglala Sioux Tribe, Pine Ridge Indian Reservation, South Dakota," February 1976.

[3] Joseph A. Califano, "Remarks to the National Journal Conference on the Economics of Aging," Nov. 30, 1978, Washington, D.C.

[4] Jerome T. Barrett and Lucretia Dewey Tanner, "The FMCS Role in Age Discrimination Complaints: New Uses of Mediation," *Labor Law Journal*, November 1981, pp. 749–50, describes more fully the assessment center concept, which relies heavily on training through case studies and role playing exercises.

[5] Because of budget cuts in 1981–82, the community conciliators were fired. Age discrimination mediation is now performed exclusively by FMCS mediators.

[6] See Barrett and Tanner, "The FMCS Role," pp. 745–54.

[7] Jerome T. Barrett, "Skilled Are the Peacemakers," *Northeast Training News*, June 1980, p. 19.

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THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN ENFORCEMENT ACTIONS IN THE U.S. ENVIRONMENTAL PROTECTION AGENCY

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I. Introduction: The Need and Impetus

The genesis of the idea to use third-party neutrals in some enforcement actions at the U.S. Environmental Protection Agency (EPA) came in early 1985 from two independent sources: (1) the need for Agency enforcement personnel to more effectively negotiate resolutions to enforcement cases, and (2) a growing enforcement case backlog. In response to the former, EPA enforcement staff developed a course designed to enhance the skills of Agency and Department of Justice (DOJ) personnel working as a team, in negotiating settlements in enforcement cases. The exploration of better ways to resolve enforcement matters led the developers of the negotiation course to the use of third-party neutrals.

At the same time, EPA was beginning to open new enforcement cases faster than it closed existing ones, and the gap was starting to widen. This fact forced the Agency to look at new ways of making its enforcement program more efficient as it also became clear that EPA would not be receiving significant additional enforcement resources. ADR was suggested, along with other innovative enforcement ideas such as environmental auditing as a means of improving EPA's enforcement effort.

Two other offices within EPA had already begun using ADR to aid in the resolution of other types of disputes. First, the Agency had used facilitators to help in the promulgation of certain regulations, a program that became known as negotiated rulemaking. To date, EPA has used this technique in six rulemakings. Second, the Superfund Community Relations Office began a pilot program to use facilitators at Superfund sites where there was no enforcement action, i.e., EPA could not identify any parties who may be liable for cleanup. At these sites, the only interested parties are the various governmental entities and the citizenry. EPA has successfully used facilitators at several of these sites to negotiate a cleanup agreeable to all parties.

As discussion about the use of ADR in enforcement began and various individuals raised concerns about its use in this context, it became necessary to address these concerns in writing and to set forth procedures for the use of ADR in enforcement actions at EPA. The result was a draft guidance on this topic, issued on December 2, 1986, and planned for completion in the spring of 1987. This article discusses two sections of the draft guidance: (1) the selection of enforcement cases appropriate for ADR, and (2) the selection and qualification of neutrals. The article also addresses the advantages and concerns about ADR in EPA's enforcement program.

II. Selection of Appropriate Cases

In order to employ neutrals in enforcement actions, it was necessary for the Agency to develop a process for the selection of appropriate cases. One of the first questions that arose in this context was how to describe the kinds of cases that may be suitable for ADR, i.e., how can one choose from an existing caseload those actions where ADR might be helpful.

A two-part process seemed to be the most useful way to handle this problem. The guidance, therefore, first describes criteria which EPA enforcement personnel can use to search through their existing caseloads to make a preliminary determination as to which cases might be suitable for ADR. After this first step of a preliminary determination, those working on a case meeting the criteria are to hold more detailed discussions to: (1) reach consensus among government negotiation team members on using ADR in this case, (2) evaluate in greater depth those aspects of the preliminary criteria which are specifically applicable to this case, and (3) evaluate the willingness of the violators to participate in ADR.

Development of the criteria for the preliminary determination proved to be a difficult task. A search of the relevant literature revealed little that was useful. It, therefore, became necessary to develop such characteristics from the experience of EPA enforcement personnel.

We concluded that cases appropriate for ADR appeared to fall into two major and one minor category. One major category includes actions where the parties have reached, or anticipate reaching, a negotiation or litigation impasse. Such impasses arise for many reasons including personality conflicts, poor communication between parties, multiple parties with conflicting agendas, inflexible negotiating postures, sophisticated technical circumstances leading to a myriad of factual disputes, and any other reasons slowing or halting progress toward the resolution of the action.

The second major category encompasses those cases that require an inappropriate level of Agency resources. In such actions the resolution of the dispute would require an excessive expenditure of government time or money so that it would be more efficient to use a neutral to resolve all or parts of the case. This category includes cases with a large number of parties; with a large number of issues; where the issues are complex, divisive, or controversial; or which are so routine that they do not merit the usual expenditure of resources required for enforcement. In this latter subcategory, streamlined, binding ADR techniques such as arbitration are extremely useful.

The minor category involves actions where the remedy a court may award would not achieve the long-term environmental results desired. These cases usually require the involvement of persons or entities not parties to the lawsuit such as state or local authorities to resolve an underlying political problem or provide funding for the remedy.

III. Selection and Qualification of Neutrals

A. Selection of ADR Mechanism

The Agency encountered similar problems in drafting its guidance regarding the selection and qualification of neutrals for specific disputes. Prior to the actual selection and qualification, however, the question arises as to which ADR mechanism is most appropriate for a specific dispute. One can safely assume that at least some of the parties to most enforcement actions by EPA will be unsophisticated about the use of ADR.

Therefore, it is important that there be someone to advise the parties as to which ADR mechanism to use. The Agency is considering a number of proposed approaches, yet all appear to have drawbacks.

One suggestion is for the parties to hire a professional neutral to help them select the appropriate ADR process. While such a person would no doubt be helpful, this approach would extend the time period required for ADR, thus making ADR less attractive to EPA personnel. The existing enforcement process is already viewed by many Agency personnel as overly time consuming and cumbersome. Additionally, this approach would make the process more costly for all parties.

A second suggestion is to the use trained EPA personnel to aid in the selection of an appropriate mechanism. While this idea would save time and expense, there is no guarantee that violators would view such personnel as unprejudiced, and may consider any suggestions by such EPA personnel to be unacceptable.

For now, the Agency has determined to let the parties decide this issue on a case-by-case basis, using whatever decisionmaking method upon which they can agree. The experience gathered in actual cases should suggest the best method for handling this issue.

B. Neutral Selection

In its use of third-party neutrals, EPA is likely to draw from two different kinds of sources. First, assuming that the Agency will eventually use neutrals on a fairly regular basis, it will be necessary to have a comprehensive list of neutrals with certain disciplines from which the Agency can make selections. These disciplines would include mediation, arbitration, and certain others. Because the list would be used by a federal agency, it should be open to anyone who wishes to be considered as a potential neutral in an EPA enforcement action. On the other hand, there needs to be some screening of applicants to build a reliable list of candidates. Further, an organization other than EPA should compile and maintain this list. Thus, neutrals drawn from such a list would not automatically be considered tainted by other parties to the dispute.

Second, the Agency also needs an organization with the capability to find appropriate neutrals with specific expertise for fact-findings, mini-trials, and other ADR processes requiring such expertise. Because each case will require a different kind of expertise, it is not possible to maintain a list of such experts. For the same reasons enumerated above concerning the list of mediators and arbitrators, this search capability should be maintained by an organization other than EPA.

C. Qualification by EPA

After obtaining a list of names of potential neutrals for a case, it is necessary to evaluate their credentials before selection. In developing guidelines for the qualifications of neutrals, the Agency drew heavily from the draft ethical guidelines of the Society for Professionals in Dispute Resolution and its emphasis on disclosure. The qualifications suggest that EPA personnel require that candidate neutrals disclose relevant categories of of information. Based on these disclosures, the government can then choose a neutral with which it is most comfortable. These categories are: (1) demonstrated experience as a neutral, including other relevant experience such as training or judicial experience; (2) independence based on interests or relationships; (3) subject matter expertise, if applicable; and (4) other roles in the case in which the neutral may be serving.

IV. Advantages and Concerns

A. Advantages

The advantages of using ADR in a federal agency like EPA are generally the same as those enjoyed by any other participant in an ADR process in any other context. For EPA, like others, ADR is a case management tool. It is but one way to improve the efficiency by which a person or an organization resolves its disputes.

For binding ADR mechanisms such as arbitration the primary benefit is an expeditious resolution of the matters to be decided. Binding ADR mechanisms provide streamlined procedures and an abbreivated time period prior to hearing and decision. One result is that EPA saves manpower resources which it may then devote to other cases. Further, by selecting the issues it wishes to submit to binding ADR, the Agency retains control over that part of the dispute resolution process.

For non-binding ADR mechanisms such as mediation, many of the benefits are more subtle. First, such techniques give the parties almost complete control of the dispute resolution process. Second, resolutions arrived at in this way are usually more creative, and there is greater commitment to them. Because there is no winner and no loser, the solutions "feel fairer." Finally, a neutral can help the parties to stop wasting their time on collateral issues like personalities, and to devote their energies to the solution of the dispute.

B. Concerns

In the process of discussing ADR with EPA and DOJ personnel, one naturally hears the concerns they have about using these mechanisms. Strangely enough, a number of these concerns are that ADR will cause the problems that these techniques are designed to cure. While most of the reservations I encountered are those one may expect from any individual not familiar with ADR, there were a few that appear to be specific to a bureaucracy if not EPA itself.

Some of the concerns reflect fear of appearing inadequate or losing control of the case itself. One EPA official stated that the primary reason for resistance to ADR is that enforcement personnel believe that the act of bringing in a neutral is an indication of a failure to resolve the case on one's own. Coupled with this feeling is an often expressed belief that by "turning the case over to a neutral" one loses control of it. Some of this reaction to ADR is attributable to the initial viewing by some individuals of all ADR as mechanisms by which neutrals decide cases. Some education in how non-binding techniques, such as mediation, work may mitigate this reaction.

EPA enforcement personnel are rightly afraid that ADR will be used by some violators as another means of drawing out negotiations and delaying compliance with environmental laws. Without appropriate litigation pressure and a deadline for the use of ADR, this fear can become reality.

DOJ expressed concern that neutrals may be compelled to testify regarding matters the parties tell them in confidence. This concern is more pronounced for Superfund cases where actions are usually pursued against multiple defendants. In these cases EPA may reach agreement with some of the defendants (with or without the use of a neutral), and then pursue the others for the balance of the government's costs. In such cases, EPA and DOJ are concerned that those parties who have not reached agreement with EPA would attempt to compel a neutral who worked with the settling parties to testify regarding information imparted to the neutral during settlement discussions.

There appear to be a number of ways of meeting this concern about confidentiality of discussions with neutrals. EPA is considering either promulgating its own regulations or amending those of DOJ which do not allow neutrals to testify regarding information learned from parties to disputes without specific authorization from a high ranking agency official. Additionally, there is case law both regarding settlement discussions and the Freedom of Information Act which indicates that it is against public policy to compel neutrals to testify as to what parties confided in them.

Another often expressed concern is that ADR will not save resources, but will take additional time to introduce a neutral into a case. In this view, use of a third-party is an extra step in the enforcement process. Similarly, there is the belief that the process of obtaining a neutral will take too long, especially when one considers how slowly anything moves through the bureaucracy. To meet this latter concern EPA has developed a process for using ADR which not only fits within existing Agency enforcement procedures, but is as expeditious as possible.

Unique to EPA is a management system which provides rewards and incentives for certain types of enforcement activities, most important of which activities is the bringing of enforcement actions. One of the often mentioned concerns by EPA personnel is that the existing management system at EPA does not provide any incentives for the use of ADR and, in order to encourage its use, such incentives must be included. EPA is presently developing such rewards and incentives.

Finally, many DOJ and EPA personnel view enforcement actions, not as disputes between parties, but as quasi-criminal actions against violators. Whether expressly stated or not, there is a widely held belief that ADR is inapproriate in such matters. It is my opinion that these individuals believe that courts will deal appropriately harshly with violators, and that use of neutrals will blunt the government's prosecutorial vigor.

There are several responses to this view. First the environmental statutes which EPA administers have criminal provisions, and both EPA and DOJ have a separate criminal office to prosecute offenses falling under these provisions. EPA does not presently advocate ADR in its criminal cases. Second, while some government personnel may view all violators as criminal, most violators and judges do not. There are usually some mitigating circumstances from the violator's viewpoint as to why the particular facility is not in compliance that makes the great majority of environmental enforcement cases inappropriate for criminal action because criminal intent cannot be proven. Thus, most EPA enforcement actions must proceed like other civil lawsuits. Some EPA and DOJ personnel, however, tend to treat civil violators as criminals which naturally causes violators to become defensive. In such cases, a spiral of combativeness and non cooperation begins, and cannot easily be stopped. It is in exactly these kinds of cases where a neutral can help the parties to turn their attention from their positions to their interests.

V. Conclusion

While there are many concerns about the use of ADR in enforcement actions at EPA, the benefits clearly outweigh the concerns. Further, both EPA and violators need to find creative ways of resolving disputes without tying up extensive resources. The greatest challenge is to convince Agency personnel and violators of this fact so that they will suggest the use of ADR in specific cases.

With the recent draft guidance, on which much of this article is based, EPA has taken the lead among federal agencies in developing a process for using ADR in a major agency program. We believe that with the experience of a few case examples, and EPA's success in negotiated rulemaking and Superfund Community relations, EPA and other agencies will want to integrate the use of ADR into its approach to resolving the many types of disputes in which federal agencies are involved.

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Mediation and Adjudication: The Double Track Approach

By ST. JOHN BARRETT*

As burgeoning caseloads have imposed increasing stress on our adjudicative systems, renewed attention has been given to arbitration, mediation and other less formal means of keeping disputes from reaching the adjudicative track. Relatively little attention, however, has been given the possible parallel use of mediation to resolve disputes already on that track. This article will examine recent experience of the U.S. Department of Health and Human Services in formally establishing for its grant-in-aid programs a mediation process to resolve disputes already in administrative adjudication. The HHS experience suggests this process would be useful to other agencies in resolving both grant and non-grant disputes under adjudication.

The HHS Mediation System

In the 1970s, Federal agencies charged with responsibility for administering Federal programs of grants-in-aid have increasingly used formally established grant appeals boards to hear and adjudicate disputes between granting agencies and grantees. The first of these appeal boards, and one that has served as a prototype for other such boards, was established by the Department of Health, Education, and Welfare (HEW) in 1973.[1] The HEW Grant Appeals Board has been continued, under a new and revised regulation,[2] by the Department of Health and Human Services (HHS), HEW's successor agency. The regulation accords HHS grantees under designated programs the right to appeal final decisions of an HHS constituent agency on a dispute arising under an existing grant. The Departmental Grant Appeals Board, upon the basis of written submittals by the grantee and the granting agency, supplemented in some cases by a hearing that affords opportunity to produce evidence and witnesses for cross-examination and oral argument, renders a reasoned, written decision on the dispute.[3]

Although HEW was the first federal granting agency to establish a grant appeals board, it was one of HEW's emulators, the Environmental Protection Agency, that first formally provided for mediation as an adjunct to board review. The EPA procedure, adopted in 1979, provides:

> *123 Mediation.*
> If the Board decides that mediation would be useful to resolution of a dispute, the Board, in consultation with the parties, may require use of mediation techniques and will assist in selecting a mediator. The mediator may take any steps agreed upon by the parties to seek resolution of the dispute or clarification of issues. The results of mediation are not binding on the parties unless the parties so agree in writing. The mediator and the Board may not communicate about the merits of the case in the absence of the parties.[4]

Although EPA was the first agency to adopt such a provision, it had, as of early 1982, yet to use mediation techniques in any pending appeal.

Long before it had a regulation authorizing or requiring mediation of pending grantee appeals, the Grant Appeals Board at HEW pushed grantee-appellants and agency-appellees to the conference table in appropriate cases.[5] The Board institutionalized this practice in 1979 by routinely including in a letter to the parties acknowledging the receipt of the appeal a paragraph reciting that the Board favored efforts to resolve the dispute by direct discussion between parties, allowing thirty days within which such discussions could be instituted, and requiring the grantor agency within that time either to submit a written report on the status of such discussions or to file its written response to the appeal.

On January 6, 1981 HHS published a notice of proposed rulemaking in the Federal Register proposing extensive revision of its grant appeal procedures, including adoption of mediation similar to that in use at EPA.[6] The HHS Board commenced using mediation procedures without waiting, however, for promulgation of a final rule. On March 20, 1981, it designated, at the request of a grantee-appellant, a member of its staff to assist in mediating the appealed dispute.[7] On August 6 and August 7, 1981 the Board designated a mediator in each of two pending appeals that had earlier been filed by the State of California.[8] Shortly thereafter, on August 31, 1981, HHS issued its final rule revising the grant appeal procedures and including the following new provision on mediation:

> *§ 16.18 Mediation*
> (a) *In cases pending before the Board.* If the Board decides the mediation would be useful to resolve a dispute, the Board, in consultation with the parties, may suggest use of mediation techniques and will provide or assist in selecting a mediator. The mediator may take any steps agreed upon by the parties to resolve the dispute or clarify the issues. The results of mediation are not binding on the parties unless the parties so agree in writing. The Board will internally insulate the mediator from any Board or staff members assigned to handle the appeal.
>
> (b) *In other cases.* In any other grants dispute, the Board may, within the limitations of its resources, offer persons trained in mediation skills to aid in resolving the dispute. Mediation services will only be offered at the request, or with the concurrence of a responsible federal program official in the program under which the dispute arises. The Board will insulate the mediator if any appeal subsequently arises from the dispute.[9]

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In all instances, the Board has designated as mediator a member of its own staff, although under its regulation it could go outside its staff or even outside the Department. In designating a mediator, the Board formally instructs the mediator and advises the parties that the mediator will be insulated from all contact with the Board and the rest of its staff concerning the case. Those designated as mediators have received special training from the Federal Mediation and Conciliation Service.

Despite the felt need to insulate the mediator from the Board, both the Board and mediating parties perceive advantages in designating a staff member to mediate. As a grantor representative has said, it puts "the psychological weight of the board" behind the mediator.[10] Similarly, a grantee representative emphasizes that the long-term need of the grantor agencies to maintain credibility with the Board has a moderating influence on their stance before a staff member of the Board.[11]

The HHS Experience

Although there were only seven cases under the HHS procedure available for study by the author, they presented a surprising number of variables. Of the seven mediated cases:

- —four involved mandated state plan programs, while three involved discretionary project grants to private grantees;
- —in four the mediated issues were largely factual, while in three they were largely legal;
- —two cases arose from a component HHS agency having a highly structured process within the agency for resolution of grant disputes, while the others did not;
- —mediation was prompted in three cases by the Board itself and in four cases by the grantee;[12]
- —the amounts in dispute ranged from a low of $1,346 to a high of over $4½ million.

Examination of the cases suggests that likely success of mediation is related to whether the issue is primarily of fact or of law, but is unrelated to any of the other above variables. The four successfully mediated cases were:

(1) a $1.8 million dispute with California concerning the proper count of eligible patients for dental services under a Medicaid "pilot project"; mediation prompted by the grantee;[13]

(2) a $4½ million dispute with California concerning adequacy of documentation of claims for nursing care; mediation prompted by the grantee;[14]

(3) a $4½ million dispute with California concerning adequacy of documentation to support state claim for federal funding of abortions under Medicaid; mediation requested by the grantee;[15] and

(4) a $1,346 dispute with a Headstart Program project grantee regarding the legal adequacy of claimed grantor approval of grantee expenditures; mediation prompted by the Board.[16]

The three California mediation successes clearly turned on further, cooperative development of the facts. In the fourth mediation success, on a small claim under a Headstart project, the issue, ostensibly legal, clearly would have been adjudicated against the grantee. The legal issue was avoided, however, by a program adjustment, suggested by the Board, that permitted federal funding. While none of the mediation successes resolved a seriously disputed legal issue, both of the mediation failures did.

The first of the cases in which mediation failed was a $190,000 dispute between the Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA) and a proprietary recipient of a research grant, concerning proper construction of the terms of a project extension and the legal efficacy of retroactive approval by a grantor representative of certain grantee expenditures.[17] The grantee engaged private counsel who, after exhausting the informal review procedures within ADAMHA, filed a formal appeal with the HHS Grant Appeals Board. Thereafter, he requested a further opportunity to negotiate, and on March 20, 1981 the Board chair designated a member of its staff to serve as mediator. Despite direct discussion between the parties under the direction of the mediator, ADAMHA adhered to its positions that (1) the expenditures were beyond the scope of the grant extension and (2) retroactive approval was ineffective. The mediator advised the Board that voluntary resolution of the dispute was unlikely, and on June 16, 1981 the Board terminated mediation. Formal adjudication resumed, and the Board on February 23, 1982 reversed the audit disallowance upon the ground that the expenditures had been within the terms of the grant extension.

Although mediation failed, counsel for the grantee expressed satisfaction with the mediation process. It enhanced the credibility of the agency in the eyes of the grantee; it permitted counsel to promote his own credibility with the agency; it sharpened the issues; and it effectively afforded the grantee some factual discovery. Counsel also felt, for several reasons, that it gave him a better shot (although unsuccessful) at a mediated settlement: first, it introduced a new actor (the mediator) onto the scene with some independent standing; second, it provided a more formal structure for (and hence greater care and thoughtfulness in) negotiation; third, it tended to mute what he felt had been the controlling influence of departmental auditors in the disallowance.

The second mediation failure involved a $19,000 dispute with North Carolina concerning the legal sufficiency of documentation of patient consent for sterilization under a mandated state-plan program.[18] The State asserted that consent forms had in fact been executed; that they were properly retained by the attending physicians for later submittal with the physicians' claims for payment; that the disallowed costs were for collateral service providers, such as clinics and anaesthesiologists, who happened to submit their claims for payment before the physicians submitted theirs; and that when the physicians submitted their claims with the accompanying consent forms, the earlier payments to the collateral providers should then be approvable. The federal agency, on the other hand, relied on the literal language of its regulation that the consent documentation be received by the state disbursing agent "before making payment." After having first "strongly" recommended to the parties a follow-up audit to determine whether the consent forms had in fact been executed, the Board on its own initiative designated a mediator. Four months later the regional attorney, on behalf of the grantor agency, withdrew from the mediation process on the ground that the clear terms of the program regulation left nothing to mediate. The formal adjudication then proceeded to a final decision in favor of the grantor agency. In upholding the disallowance, the Board commented that the "literal application of the regulation in the facts of this case is unfortunate" and recommended that the agency consider the possibility of a "waiver" of the disqualifying precondition.

The unsuccessful mediations strongly suggest that if a disputed legal issue has not been resolved by the time adjudication commences, it is not likely to be resolved by mediation, even though the Board or the mediator may seek to promote equitable compromise. The successful mediations, on the other hand, vividly demonstrate how a mediator can help resolve differing perceptions of facts or, perhaps more importantly, guide a grantee in filling gaps in its *documentation* of the facts. The importance of the latter function may be peculiar to grant or contract disputes, where proper documentation of the facts may be as important as the facts themselves. But even where documentation gaps cannot be filled, a mediated compromise of factual issues may ensue. This is illustrated by the three cases mediated with California.

Each of the California cases involved large disputed sums, ranging from almost two million to almost four and one-half million dollars; each involved problems of documenting the eligibility of individual patients for categories of health care provided under state programs receiving federal financial assistance; in each, the ultimate success of mediation derived largely from the mediator's leadership in charting a course for further factual development. The reasons why this factual development did not occur before initiation of formal adjudication may be somewhat peculiar to grant programs. Time constraints, self-imposed by the granting agency, may require submission of claims by the grantee and rejection by the grantor before full documentation can be developed or discussed. Mediation may allow time to breathe and regroup. By introducing a new and independent party it may also permit moderation of positions that would remain rigid in the framework of adjudication.

Thus far, we have been considering simply whether and why mediation may succeed in cases already in adjudication. The HHS experience suggests that while such mediation is of little, if any, use in resolving legal disputes, it is highly successful in resolving complex factual disputes. In appraising the overall value of mediation procedure in conjunction with adjudication, however, we must consider more particularly the interests that mediation may serve or disserve.

Value of Mediation to HHS and Possible Value to Other Agencies

Mediation may serve any or all of the following purposes:

(1) To reduce the volume of formal adjudication;
(2) To enhance the speed of decision-making;
(3) To enhance the accuracy of decision-making;
(4) To reduce the cost to the parties;
(5) To foster general program goals by encouraging negotiated decisions unattainable through more formalized, visible and precedent-setting adjudication;
(6) To permit the appeal board to focus its resources on disputes that are most appropriate for adjudicative resolution; and
(7) To foster the grantor-grantee relationship by encouraging amicable resolution of grant disputes.

At the same time, it may involve the following detriments or risks:

(1) Possible nonuniformity of outcomes among grantees;
(2) Erosion of regulatory rules;
(3) Unfair pressure on parties to resolve disputes by mediation in order to reduce adjudicative caseload; and
(4) Delay in the appeal process in case of unsuccessful mediation.

The HHS experience suggests that substantially all of the potential advantages have been realized and that detriments have been nonexistent or minimal.

Although the number of mediated cases was small—e.g., in 1981, of 221 appeals filed five were mediated—the success rate was high. Of six cases in which mediation had been concluded, four resulted in agreed settlement. The results, anecdotal though they are, prove mediation an effective device for reducing adjudicative caseload.

The overall speed of decision-making was generally about the same for mediated as for non-mediated cases. In the mediated cases, time between filing of appeal and final decision and time devoted to mediation itself were:

Case No.	Year Filed	Total Time (months)	Mediation Time	Result
1	1981	12	3	Failed
2	1980	16	5½	Settled
3	1979	27	1	Settled
4	1981	8	7	Settled
5	1981	5	4	Settled
6	1981	14	6	Settled in part
7	1981	10	2½	Settled
	Average	13	4	

For the five 1981 cases the average total time was ten months. This compares with average adjudication times for all cases filed in 1980 of fourteen months, and in 1981 of seven months.

We can only speculate whether mediation has enhanced the accuracy of HHS decisions in appealed cases. However, the use of mediation to develop the factual record and to sharpen the issues suggests that any effect on accuracy should be positive.

In some cases, mediation appears to have achieved results unattainable adjudicatively. Two cases were compromised on a dollar basis without fully resolving the disputed issues, and in a third the legal issue was avoided by a program adjustment.

There is no doubt that successful mediation reduces the total adjudication cost for both grantor and grantee. Counsel for California cites this as a significant factor favoring mediation.[19] Mediation also assisted the adjudication process by eliminating some cases on which the limited resources of the Appeals Board would have been ill spent. Thus mediation eliminated three cases which, if heard, would have involved an inordinate amount of complex factual detail and another involving a very small dollar amount.

It is difficult to estimate any beneficial effect of mediation on grantor-grantee relations. Although grantor agencies themselves do not seem to place a high value on this possible effect, this may be attributable to the natural tendency to believe the possibilities of informal resolution have been exhausted before resort to the departmental appeal stage. On the other hand, mediation would seem almost inevitably to enhance the credibility of the department, if not of the particular granting agency.

As already noted, possible detriments from mediation seem not to have materialized at HHS. There is no suggestion that granting agencies have relaxed their regulatory rules in particular cases in response to mediation. Indeed, in one case in which the Board pushed mediation on the agency and later described "literal application of the regulation . . . unfortunate," the agency stood by its rule in its adjudicated decision.

Although the Board has occasionally pressed parties to mediate, this does not appear to have unduly discouraged either side from pursuing its right to an adjudicated decision.

In sum, the HHS experience confirms that by formally providing for mediation as an adjunct to adjudicatory appeal procedures a grantor agency can further the fair and efficient disposition of grant disputes. There is no apparent reason why the HHS experience should not be translatable in whole or part to other grantor agencies. Nor do case histories or the comments of participants indicate any need for modification of the particular procedures used by HHS or of the terms of the implementing regulation.

Whether HHS experience is translatable outside the area of federal grant administration is another question. Court adjudication, where time constraints on a complainant to initiate a proceeding or be barred are perhaps less severe, may have little to gain from post-suit mediation. On the other hand, in any administrative program, whether grant-in-aid, regulatory or otherwise, in which the administrator and the administered have an ongoing relationship and in which disagreement can trigger administrative adjudication, mediation deserves a role in resolving disputes even though they are already on the adjudicative track.

FOOTNOTES

[1] 38 Fed. Reg. 9906 (1973).

[2] 45 C.F.R. Part 16; 46 Fed. Reg. 43816 (1981).

[3] 45 C.F.R. §§ 16.4 and 16.21.

[4] 40 C.F.R. § 123; 44 Fed. Reg. 46774 (1979).

[5] For three more recent examples, see *Community Relations—Social Development Commission in Milwaukee County*, Docket No. 80-158; *Hyde Rural Health Corporation*, Docket No. 80-181, Decision No. 251 (Jan. 27, 1981); *Western Federation for Health Services, Inc.*, Docket No. 80-165.

[6] 46 Fed. Reg. 1644 (1981).

[7] *McLean Hospital Corporation*, Docket No. 81-22, Decision No. 258 (Feb. 23, 1982).

[8] *State of California Department of Health Services*, Docket No. 80-134; *California Department of Health Services*, Docket No. 79-110.

[9] 45 C.F.R. § 16.18; 46 Fed. Reg. 43820-21 (1981).

[10] Letter of February 16, 1982 from Cade L. Morrow, Acting Regional Attorney, Region IX, HHS.

[11] Letter of May 24, 1982 from Elisabeth C. Brandt, Deputy Attorney General, State of California.

[12] In one of these four cases, mediation may also have been prompted independently by the grantor. Letter of February 16, 1982 from Cade L. Morrow, Acting Regional Attorney, Region IX, HHS.

[13] *State of California Department of Health Services*, Docket No. 80-134.

[14] *California Department of Health Services*, Docket No. 79-110.

[15] *California Department of Health Services*, Docket No. 81-173.

[16] *Community Recreation, Inc.*, Docket No. 81-92.

[17] *McLean Hospital Corporation, supra* note 7.

[18] *North Carolina Department of Human Resources*, Docket No. 81-63.

[19] Letter of Elisabeth C. Brandt, *supra* note 11.

Final Report

# of the

Mediator/Facilitator

in the

RKO Settlement Process

February 3, 1987

Before the
Federal Communications Commission
Washington, D. C. 20554

In re Applications of	)	
	)	
RKO GENERAL, INC. (KHJ-TV)	)	DOCKET NO. 16679
Los Angeles, California	)	File No. BRCT-58
	)	
For Renewal of License	)	
	)	
FIDELITY TELEVISION, INC.	)	DOCKET NO. 16680
Norwalk, California	)	File No. BPCT-3655
	)	
For Construction Permit for New	)	
Television Broadcast Station	)	
	)	
RKO GENERAL, INC. (WHBQ-TV)	)	MM DOCKET NO. 84-1212
Memphis, Tennessee	)	File No. BRCT-790402LC
	)	
and Associated Dockets	)	MM DOCKET NOS. 84-1213; 84-1214;
	)	84-1218 TO 84-1222; AND 84-1224
	)	
RKO GENERAL, INC. [WGMS(AM&FM)]	)	MM DOCKET NO. 84-1148
Bethesda, Maryland/Washington, D.C.	)	File No. BR-1403
	)	
and Associated Dockets	)	MM DOCKET NOS. 84-1149 to 84-1151;
	)	84-1159; 84-1162; 84-1163;
	)	84-1166; 84-1167; 84-1170 to
	)	84-1173; and 84-1178
	)	
RKO GENERAL, INC. [WRKO & WROR(FM)]	)	MM DOCKET NO. 84-1057
Boston, Massachusetts	)	File No. BR-953
	)	
and Associated Dockets	)	MM DOCKET NOS. 84-1058; 84-1059;
	)	84-1061; 84-1063 to 84-1065;
	)	84-1070; 84-1072; 84-1076 to
	)	84-1078; 84-1080; 84-1081; and
	)	84-1083; and 84-1084
	)	
RKO GENERAL, INC. [WFYR(FM)]	)	MM DOCKET NO. 84-1085
Chicago, Illinois	)	File No. BRH-790801A3
	)	
and Associated Dockets	)	MM DOCKET NOS. 84-1086; 84-1089;
	)	84-1094; and 84-1096

RKO GENERAL, INC. [WAXY(FM)]	)	MM DOCKET NO. 84-1112
Ft. Lauderdale, Florida	)	File No. BRH-781002WR
	)	
and Associated Dockets	)	MM DOCKET NOS. 84-1113; 84-1114;
	)	84-1116; and 84-1118
	)	
RKO GENERAL, INC. [KHJ & KRTH(FM)]	)	MM DOCKET NO. 84-1184
Los Angeles, California	)	File No. BR-22
	)	
and Associated Dockets	)	MM DOCKET NOS. 84-1186 to 1188;
	)	84-1190; 84-1195; 84-1196;
	)	84-1198; 84-1199; 84-1201;
	)	84-1203; and 84-1207
	)	
RKO GENERAL, INC. (WHBQ)	)	MM DOCKET NO. 84-1051
Memphis, Tennessee	)	File No. BR-790402CZ
	)	
and Associated Docket	)	MM DOCKET NO. 84-1053
	)	
RKO GENERAL, INC. [WOR & WRKS(FM)]	)	MM DOCKET NO. 84-1122
New York, New York	)	File No. BR-177
	)	
and Associated Dockets	)	MM DOCKET NOS. 84-1123; 84-1124;
	)	84-1126; 84-1128; 84-1132;
	)	84-1133 to 84-1135; 84-1138 to
	)	84-1140; and 84-1146
	)	
RKO GENERAL, INC. (KFRC)	)	MM DOCKET NO. 84-1098
San Francisco, California	)	File No. BR-43
	)	
and Associated Dockets	)	MM DOCKET NOS. 84-1099 to 84-1101;
	)	84-1110; and 84-1111

To: The Commission

Final Report
# of the
Mediator/Facilitator

I. Introduction

In accordance with the Commission's direction in paragraph 9 of its Memorandum Opinion and Order released September 12, 1986 (the "RKO

Settlement Proceeding Order"), [1] the Mediator/Facilitator hereby submits his final written report detailing the results of the settlement negotiations.

A. Executive Summary

The Commission's stated goal of a mediated comprehensive settlement of litigation relating to all the RKO properties is clearly not achievable. In two proceedings (Fort Lauderdale and San Francisco) the competing applicants apparently do not wish to negotiate further. In Chicago, the demands appear to exceed any reasonable purchase price, one competing applicant refuses to move to the "sell side" of the table, and further progress seems impossible.

Some proceedings may yet settle. New York, Boston, and Bethesda were active at the time this report was being prepared but memorandums of understanding had not yet been agreed to. Bethesda is the most likely of the three to reach agreement. See Appendix XIV.

In Memphis (TV), while the competing applicants could agree to an outside offer, RKO could not. And, in Los Angeles (Radio), while only minimal information has been provided to the mediator, the chances for settlement there appear to be extremely remote.

The only firm settlement agreement reached as of January 31, 1987, was in Memphis (Radio) where only one competing applicant remained on file and where the purchase price was $750,000 as compared to other RKO properties where values ranged upwards to 70 million dollars in each market. In the case of the Memphis AM station, both RKO and the competing applicant were motivated to sell the station and the mediator's services were not needed.

B. The Mediator Will Not Assess Blame

Having worked closely with the 39 parties for the past four months it is tempting to assess responsibility for failed negotiations in several markets. But, I will not do that. First, it serves no purpose. The Commission, and virtually everyone else, recognized that the experimental mediation process involved high risk of failure. And, second, perhaps I am too close to the process to accurately assess responsibility. There is a tendency of anyone in a mediation role to expect when one party has been successfully moved toward another's position that the other party should then yield as well. The fact that some were unbending could simply mean they were _right_, not that they were recalcitrant.

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[1] RKO General, Inc. (KHJ-TV), FCC 86-383 (Sept. 12, 1986). See Appendix I.

C. Organization of the Report

For convenience of the Commission we open this report with a somewhat extensive review of the RKO proceeding. That is followed by a detailed chronology of the mediation process itself in the event this procedure may be tried again at some future date. A set of appendices is attached for the same reason. Brief explanations of the outcome of the mediation process on a market-by-market basis follows. Finally, I have appended a few recommendations which the Commission may wish to consider.

II. Background: The Protracted History and Unique Evolution of the RKO Cases

The settlement procedure established by the Commission in its Order of September 12, 1986, and the resulting negotiations constitute the latest chapter in a continuing litigation drama at the Commission and in the courts involving RKO General, Inc. ("RKO"), its numerous television and radio licenses, and the various charges of wrongdoing leveled against RKO and its parent corporation, the General Tire and Rubber Company (now GenCorp). Since 1965, the Review Board has had to deal with RKO related proceedings six times, the Commission twelve times, and the Court of Appeals five times.

A. The Los Angeles Proceeding

This proceeding began when, in 1965, RKO filed an application for renewal of the license for Channel 9, Station KHJ-TV in Los Angeles. The renewal was challenged by Fidelity Television, Inc. (Fidelity) which filed a competing application. Confronted with these two competing applications, the Commission, after finding both applicants qualified, designated a standard comparative issue for hearing to resolve RKO's renewal application and Fidelity's mutually-exclusive application for a construction permit. [2]

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[2] Order, FCC 66-503 (released June 8, 1966).

While the proceeding was pending before this agency, the Department of Justice (DOJ) in March 1967 filed a civil suit in the U.S. District Court for the Northern District of Ohio against RKO and General Tire alleging that the corporations had conspired to force parties to whom they sold goods and services to purchase, as a condition of such sales, goods and services from General Tire and/or RKO. Similarly, it was alleged that General Tire and RKO had conspired to force parties who sold them goods and services to purchase goods and services from General Tire and/or RKO. DOJ sought to enjoin them from such reciprocal dealing practices as a violation of the Sherman Anti-Trust Act. [3] In light of this civil suit, Fidelity petitioned to reopen the hearing record and present evidence on RKO's reciprocal trade practices. The ALJ received evidence on the reciprocity issue only insofar as it was "patently germane to RKO's stewardship of KHJ-TV." [4]

1. The Initial Decision

In an Initial Decision issued August 13, 1969, the ALJ found Fidelity to be the comparatively preferred applicant and denied RKO's renewal application. [5] The ALJ granted Fidelity's application over RKO's "primarily, because of KHJ-TV's poor record and, secondarily, because Fidelity does have marked superiority over General Tire in the areas of local ownership, diversification of mass communication media and favorable survey and poll support." [6]

2. The Consent Decree

While the Los Angeles Initial Decision awaited full Commission review, General Tire/RKO and DOJ entered into a consent decree in October, 1970, to settle DOJ's suit against General Tire and RKO. The consent decree, which was applicable for a period of ten years: (1) precluded General Tire from conditioning the purchase of goods or services from any person or entity upon General Tire's sales of goods or services to that person or entity; (2) prohibited General Tire from discussing with its customers the relationship between their mutual purchases and sales; and (3) required the abolition of the position of "director of trade relations" at General Tire and "director of corporate relations" at RKO.

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[3] No. C-67-155 (N.D. Ohio, filed March 2, 1967).

[4] RKO General, Inc., 44 F.C.C. 2d 149, 152 (Initial Decision 1969).

[5] Id. at 149.

[6] Id. at 227.

3. The Commission Decision

In December, 1973, the Commission, reversed the ALJ's decision in Los Angeles, and granted RKO's renewal application for KHJ-TV.[7] The opinion reversed much of the ALJ's analysis and found the two applicants equal as to the standard comparative factors. The choice of RKO turned on the policy judgment that "credit must be given in a comparative renewal proceeding, when the applicants are otherwise equal, for the value to the public in the continuation of the existing service."[8] Thus, RKO's application was granted, but because RKO was facing character issues in a comparative renewal proceeding involving WNAC-TV in Boston, this grant was expressly conditioned on the outcome of the Boston proceeding.[9]

4. The Court of Appeals Decision

The Commission's decision was affirmed on appeal to the D.C. Circuit in Fidelity Television Inc. v. FCC.[10] The court ruled that the Commission did not act arbitrarily in granting KHJ's renewal application and that the Commission finding concerning the applicant's relative equality was supported by substantial evidence. However, the court stated that the affirmance of the Commission's decision was "conditional (as was the Commission's decision) on the ultimate outcome of the Boston proceeding."[11]

B. The Boston Proceeding

Meanwhile, the Boston proceeding was still in progress at the Commission, having begun in 1968, when RKO applied for renewal of WNAC-TV. Community Broadcasting of Boston, Inc. (Community) and the Dudley Station Corporation (Dudley) filed separate construction permit applications which were mutually exclusive with RKO's renewal application. In December, 1969, the Commission consolidated and designated for hearing the mutually exclusive applications of RKO, Community and Dudley.[12]

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[7] Decision, 44 F.C.C. 2d 123 (1973).

[8] Id. at 137.

[9] Id. at 137-38.

[10] 515 F. 2d 696 (D.C. Cir. 1974).

[11] Id. at 703 n. 45.

1. The Initial Decision

The ALJ found Dudley financially unqualified and RKO comparatively preferred over Community and Dudley. The ALJ concluded that the public benefits accruing from RKO's superior record of performance throughout the renewal period and service reasonably to be expected in the future on the basis of this prior record substantially outweighed the public benefits that would be present through the added diversification of ownership of mass media that would be achieved by grant of the application of Community or of Dudley, were the latter not financially disqualified. [13]

2. Events Following the Initial Decision

After the ALJ issued his recommendation that RKO's license for its Boston station be renewed, but before the Commission acted on it, new allegations arose relating to a Securities and Exchange Commission (SEC) investigation of RKO and General Tire. The matter raised in that SEC investigation included alleged use of corporate funds for unlawful domestic purposes and improper payment to foreign government officials. A consent decree entered into between General Tire and the SEC on May 10, 1976, provided for the preparation of a Special Report by General Tire which would treat the matters raised in the investigation.[14] Although the Commission heard oral argument in June, 1976, on an appeal of the ALJ's Initial Decision, it postponed further action until after the Special Report was completed.

a. General Tire's Special Report

General Tire's Special Report was issued on July 1, 1977, and among the many conclusions were the following: General Tire and certain of its subsidiaries (a) engaged in various schemes and practices that resulted in improper domestic political contributions; (b) systematically defrauded its affiliates; (c) paid bribes to foreign agents and officials not only to do business abroad but also to keep competitors out; (d) illegally avoided the payment of foreign taxes in most of the foreign countries in which it operated through its affiliates; (e) violated foreign exchange laws; (f) maintained illegal secret and unrecorded funds; and (g) falsified books, records and other documents to conceal the misconduct. In addition, the Special Report found that RKO had filed inaccurate annual financial reports with the FCC because of deficient recordkeeping and accounting practices.[15]

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[12] Order, 20 F.C.C. 2d 846 (1969).

[13] Initial Decision, 78 F.C.C. 2d 147, 347-348 (1974).

[14] SEC v. The General Tire and Rubber Co. and Michael Gerald O'Neil, No. 76-0799 (D.D.C., consent injunction filed May 16, 1976.)

b. Further Commission Proceedings

Before the Commission could act in light of the Special Report, RKO, Community, and Dudley proposed a settlement whereby RKO would sell WNAC-TV to the Boston challengers for $54,000,000 contingent on the FCC finding that RKO was qualified to be a broadcast licensee.[16] This proposed finding would have applied to the Los Angeles and New York proceedings as well since both of those proceedings were conditioned on the outcome of the Boston case. Fidility and the competing applicant in New York, Multi-State Communications, Inc. (Multi-State) accordingly sought, and on June 21, 1979, were permitted by the Commission, to participate as parties in the further proceedings to consider the proposed settlement in Boston and to determine the impact of the Special Report on RKO's qualifications.[17]

Oral argument was conducted on July 18, 1979, before the Commission, *en banc*. Following lengthy oral argument the Commission concluded, on the basis of the record, it could not find RKO qualified to remain a broadcast licensee. At the same time the Commission decided that it wanted further submissions from the parties before it decided what action to take.[18] The

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[15] Special Report (released July 1, 1977, and filed with FCC July 19, 1977).

[16] *See* 78 F.C.C. 2d at 20-21.

[17] Order, FCC 79-403 (released June 28, 1979). The Commission also directed the parties to file summaries of the positions and to present oral argument on the matter to the full Commission.

[18] Order, FCC 79-453 (released July 20, 1979).

Commission reopened the record for the purpose of accepting into evidence the Special Report. In response to the Commission's request, all of the parties, including Multi-State and Fidelity, filed proposed findings of fact and conclusions of law and reply pleadings.

C. The Commission's Decision

In June, 1980, the Commission in perhaps the most striking enforcement action in the agency's history stripped RKO of its license for WNAC-TV (Channel 7), Boston, and denied RKO renewal of licenses for WOR-TV (Channel 9), New York, and KHJ-TV (Channel 9), Los Angeles, as it had conditioned the latter renewals on the outcome of the Boston renewal case. The Commission found RKO unqualified to be a licensee and denied renewal on grounds of corporate misconduct by RKO and its lack of candor in dealing with the FCC in the renewal proceeding. [19] The action was based on the record developed in hearing and on the Special General Tire Report prepared in response to the 1976 complaint by the SEC. [20]

In disqualifying RKO, the Commission found that the record of the WNAC-TV proceeding clearly and convincingly demonstrated that:

-- In close cooperation with its parent, General Tire and Rubber Company, and its sister subsidiaries, RKO participated in an improper reciprocal trade program that was anticompetitive.

-- RKO knowingly filed false financial statements with the FCC.

-- RKO failed to exercise sufficient control over trade and barter record-keeping at its stations and made policy judgments which contributed substantially to the continued inaccuracy of those records. In this, as well as at least one other area (sponsorship identification), RKO's derelictions reflected a lack of supervisory control and a lack of concern for compliance with FCC's rules and applicable law.

-- RKO lacked candor in its dealings with the Commission and willfully withheld from the FCC information relevant and material to the WNAC-TV proceeding.

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[19] RKO General, Inc. (WNAC-TV), 78 F.C.C. 2d 1 and 78 F.C.C. 2d 355 (1980).

[20] Id.

— The relationship between RKO and General Tire was such that the conduct and character of General Tire bore substantially on RKO's qualifications to be a licensee. The record demonstrated that General Tire had engaged in serious misconduct including: improper domestic political contributions; schemes which defrauded partly owned affiliate companies of millions of dollars, thereby cheating General Tire's partners; improper payments to foreign officials in Morocco, Venezuela, Mexico, Iran and Chile, not only to obtain business but to prevent other firms from obtaining business; and improper secret accounts designed to avoid foreign tax laws and foreign exchange laws. The activities of General Tire standing alone, however, would not have warranted disqualification of RKO.[21]

D. The Court of Appeals Affirmance (In Part) and Remand

The U.S. Court of Appeals for the District of Columbia Circuit in December, 1981, affirmed the Commission's action on WNAC-TV on the limited ground that RKO had lacked candor in its dealings with the Commission. [22]

The court rejected the Commission's conclusion that RKO disqualification was warranted due to reciprocal trade practices. [23] Additionally, the court rejected the Commission's conclusion that RKO had intentionally, and with an intent to deceive, filed false annual financial statements. [24] Finally, the court held that the lack of candor issue could not sustain the denials in the New York and Los Angeles cases without further review and then remanded those proceedings for consideration of the impact of the Boston disqualification on RKO's qualifications to remain licensee in New York and Los Angeles. [25]

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[21] *Id*. at 3-5.

[22] RKO General, Inc. v. FCC, 670 F. 2d 215 (1980), *cert. denied*, 456 U.S. 927, 457 U.S. 1119 (1982).

[23] *Id*.

[24] *Id*.

[25] *Id*.

E. The RKO Case on Remand

The D.C. Circuit Court of Appeals in August, 1982, vacated the Commission's 1980 order which suspended the right to file competing applications for the frequencies of RKO's 13 remaining stations.[26] In response, the Commission, in February, 1983, waived its application cut-off rules to permit the filing of applications challenging the remaining 13 television and radio station licenses held by RKO.[27] Over 171 applications were filed. Thirty-nine of those remained active during the mediation period.

In December, 1982, the Commission authorized RKO to relocate WOR-TV from New York City to Secaucus, N.J., issued a new station license for a five year term, and terminated the comparative New York proceeding.[28] This action was in compliance with legislation enacted earlier that year which required the Commission to renew the license of any station that agreed to relocate to a state which did not have a commercial VHF station.[29]

The Commission in July, 1983, bifurcated the KHJ-TV proceeding, with Phase I focusing exclusively on resolution of RKO's basic qualification and Phase II including an evaluation of Fidelity's basic qualifications and consideration of the comparative qualifications of both RKO and Fidelity.[30] In order to expedite matters and avoid relitigation of common issues, the Commission stated its intentions to apply findings and conclusions reached in the KHJ-TV proceeding as to RKO's basic qualifications to the 13 other proceedings where RKO's broadcast licenses were being challenged. Accordingly, the Commission stated that the applicants for the other 13 stations would be permitted to participate in the KHJ-TV proceeding for the limited purpose of adjudicating and resolving common questions as to RKO's overall basic qualifications.[31]

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[26] New South Media Corp. v. FCC, 685 F. 2d 708 (1982).

[27] RKO General, Inc. (KHJ-TV), 54 Rad. Reg. 2d (P&F) 53 (1983). The 13 broadcast facilities are: WGMS(AM & FM) Bethesda/Washington; WRKO(AM) and WROR(FM), Boston, Massachusetts; WFYR(FM), Chicago, Illinois; WAXY(FM), Fort Lauderdale, Florida; KHJ(AM) and KRTH(FM), Los Angeles, California; WHBQ-TV and WHBQ(AM), Memphis, Tennessee; WOR(AM), and WRKS(FM), New York, New York; KFRC(AM), San Francisco, California.

[28] Channel 9 Reallocation, 53 Rad. Reg. 2d (P&F) 469 (1983).

[29] See, 47 U.S.C. Sec. 331 (1982).

[30] RKO General, Inc. (KHJ-TV), FCC 83-341, released July 19, 1983, recon. denied, 96 F.C.C. 2d 1161 (1984).

[31] Id.

F. The Commission's Settlement Order

On November 5, 1985, RKO, Fidelity, and Westinghouse Broadcasting and Cable, Inc. ("Group W") announced plans, subject to Commission approval, whereby RKO would dismiss its application for renewal of its license for KHJ-TV, Fidelity would have been licensed to operate on Channel 9, the stock of Fidelity would have been transferred to Group W, Group W would have acquired the KHJ-TV assets from RKO, and Group W, through a corporate merger, would have become the sole shareholder of Fidelity, which would have operated Channel 7. In the proposed transaction, Fidelity stockholders would have received $98 million and RKO would have received $212 million.

In its RKO Settlement Proceeding Order of September 12, 1986, the Commission waived Section 1.301(b) of the rules precluding appeals of interlocutory rulings without the presiding Administrative Law Judge's permission, thus allowing it to consider the merits of the proposed settlement agreement.[32] It was suggested by the parties, however, that even if the Commission approved the transfer to Westinghouse, the ALJ could still be permitted to rule as to the basic qualifications of RKO to remain a licensee of the Commission.

In the RKO Settlement Proceeding Order, See Appendix I, the Commission, noting that the proposed settlement raised basic and far-reaching policy questions which warranted further consideration, did not reach a final decision on the merits of the proposed settlement agreement.[33] Nevertheless, in an attempt to resolve the more than twenty years of RKO-related litigation, the Commission unanimously endorsed a mediation procedure to seek settlement in the nine other RKO comparative renewal proceedings. Thus, the Commission invited the applicants in those nine other comparative proceedings to participate in comprehensive settlement negotiations looking toward termination of all RKO-related litigation.[34]

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[32] RKO Settlement Proceeding Order at Para. 6.

[33] Id. As noted elsewhere in this report, the KHJ-TV Settlement Agreement has since collapsed. See Appendix XIII.

[34] Id. at Para. 7.

The Commission suggested that I serve as Mediator/Facilitator during the settlement proceeding, but left the final determination to the parties themselves.[35] The Mediator/Facilitator was empowered to convene meetings, assist the parties in reaching amicable settlement agreements, and keep the Commission apprised of developments.[36] The Mediator/Facilitator's role was designed to encourage all parties to the RKO proceedings to reach a comprehensive settlement which would save the Commission and the parties years of litigation and incalculable time and money.[37] Agreement on any settlement was left to the parties and approval or disapproval of any settlement agreement was reserved to the Commission.[38]

Whether or not I had been selected as Mediator/Facilitator, I was required to convene the first meeting of all of the parties within 15 days of the release date of the Commission's Order, remain as a participant in the settlement discussion process, submit a written report to the Commission within 75 days of the release of the Order apprising the Commission of the progress of settlement negotiations, submit a final written report by January 31, 1987, detailing the results of the settlement negotiations,[39] and serve all parties with copies of all written reports to the Commission concerning the settlement negotiations.[40]

To foster a climate favoring settlements, the Commission stated that all RKO proceedings other than Phase I of the KHJ-TV proceeding involving resolution of RKO's basic qualifications, would be held in abeyance to allow applicants to concentrate their "individual energies" on the settlement negotiations.[41] Phase I of the KHJ proceeding is ongoing with Proposed Findings of Fact and Conclusions of Law scheduled to be filed with the presiding ALJ on February 13, 1987.

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[35] Id. at Para. 8.

[36] Id.

[37] Id. at Para. 7.

[38] Id. at Para. 8.

[39] Id. at Para. 9 and 16.

[40] Id. at n. 11.

[41] Id. at Para. 10.

III. The Mediation Process

A. Notification of Separation

On September 16, 1986, I filed a "Notification of Separation" with the Commission in the RKO Settlement Proceeding. See Appendix VII. I stated that, effective immediately and permanently, I was separating myself from overseeing the Mass Media Bureau's trial staff in any subsequent proceedings involving RKO matters. Further, I announced that Roderick K. Porter, Duputy Bureau Chief for Operations, would assist me in the settlement process and was also separated from the Bureau's trail-related RKO matters. Finally, I stated that William H. Johnson, Deputy Bureau Chief for Policy, would be responsible for RKO trial-related matters and would be separated from the settlement negotiations. Subsequently, on October 9, 1986, Donald W. McClellan, Jr., Commission staff attorney, was added to the Mediator/Facilitator staff and was separated from future participation in any RKO litigation. Finally, on October 16, 1986, I filed a "Notification of Separation/Recusal" with the Commission recusing myself, Mr. Porter, and Mr. McClellan from any involvment in In re Application of RKO General, Inc. (For Assignment of License of WOR-TV, Secaucus, New Jersey to GTH-101, Inc.). While I did not believe that recusal was legally required, the action was taken out of an abundance of caution.

B. Announcement of First Meeting

On September 18, 1986, I sent a letter to all parties in the RKO proceedings inviting them to a meeting on September 25, 1986, where the Mediator/Facilitator would be selected. The letter requested that all principals attend the meeting. See Appendix VII.

C. Preliminary Discussions Prior To The Initial Meeting

Mr. Porter and I engaged in discussions with RKO and various other parties, at their request, preliminary to the initial meeting of all parties.

D. The Initial Settlement Meeting

At the first settlement meeting on September 25, 1986, I carried out the initial responsibilities assigned to me by the Commission prior to the selection of the Mediator/Facilitator. See Appendix VIII. Nominations were taken from the floor and a "roll call" vote was taken, with one vote assigned each applicant, including RKO.

I was ratified as Mediator/Facilitator by 36 of the 39 parties with three parties abstaining. An attorney for the three parties abstaining questioned the legality of the Commission's entire procedure and abstained to preserve any rights the clients might otherwise have waived by acquiescing in the selection of a mediator.

Following the Mediator/Facilitator election, a discussion of a variety of issues followed. A. William Reynolds, President and Chief Executive Officer (and now Chairman of the Board) of GenCorp, RKO's parent, stated that the company intended to try to achieve settlement in such a way that all of the 13 broadcast properties involved would be sold and RKO would extricate itself from broadcast ownership. RKO also indicated that neither they, Fidelity, nor Westinghouse were interested in reopening KHJ-TV to fresh settlement negotiation. Mr. Reynolds further suggested a process be utilized whereby the competing applicants attempt to resolve, on a percentage basis, how much they individually wished to obtain from a sale of the properties, then RKO would work to find buyers at the highest possible price. This process was not acceptable to the applicants but Mr. Reynolds personally remained active throughout the mediation process, as did other GenCorp and RKO executives and counsel.

The parties were told that six potential third parties had expressed an interest in some or all of the contested properties. There was a consensus reached that the "inside" parties (i.e., RKO and the competing applicants) would discuss settlement possibilities among themselves through October 3, 1986, a deadline that was stretched for an additional month. They were to report on their progress to the Mediator/Facilitator's office and indicate whether they were interested in bringing third parties into the process. After the meeting's adjournment, individual market negotiating sessions were held by parties involved in the Memphis TV, Bethesda/ Washington, New York and Boston proceedings.

E. Third Parties

The Commission in the RKO Settlement Proceeding Order of September 12, 1986, specifically provided for possible participation of third parties "if such entities participation will serve the greater public interest of bringing all of the RKO proceedings to an expeditious conclusion." [42] The procedure of the Mediator/Facilitator's office was to (1) compile a list of contact persons for those third parties who had already expressed an interest in making offers for some or all of the contested properties; (2) periodically issue a listing of those potential third parties to all of the "inside" parties, and (3) ask those potential third parties to remain on the sidelines unless contacted by RKO or one of the competing applicants. Memoranda containing a listing of potential third parties were issued on October 1, 10, 20, and November 6, 1986 to all parties to the RKO Settlement

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[42] Id. at para. 8.

Proceedings. See Appendix XII. These lists contained a total of 27 potential third parties. At the request of certain parties, I provided a final comprehensive listing of the contact persons for the third parties on December 5, 1986. The listing included deletions from the previous memoranda and additions since the issuance of those listings. The number had grown to a total of 32 third parties. Finding willing buyers for the RKO properties was never a problem.

Because of the lack of finality in any market and because certain "inside" parties had already brought in "outside" parties in certain negotiations by early November, 1986, I perceived that a consensus was developing that the process should move toward more active third party involvement. Therefore, in order to hear the "inside" parties' desires on whether third parties should be brought into the process and to explore the procedure by which third parties might participate in the settlement proceeding, I scheduled a meeting for November 18, 1986. At the meeting, there was a consensus to welcome third parties in all markets based generally on an interest by the 39 participants to see how much money such third parties were willing to pay, i.e., to see what the market would bear. Further, there was a consensus on the process by which third parties would be permitted to participate in the settlement proceeding.

Those third parties interested in making an offer for some or all of the properties were invited to submit bids for the properties on a market-by-market basis. The bids were to be submitted to the Mediator/Facilitator's office no later than 5:30 p.m.,December 8, 1986. The bids were to be accompanied by: (1) a statement of citizenship; (2) a statement of cross-ownership and multiple ownership interests; (3) a statement regarding character qualification; and (4) proof of financial capability to close at the bid price and the financial wherewithal to operate the station for three months after closing without revenues from operation of the station. Financial and other relevant data required to make an offer was provided by RKO to the third parties once the third party signed a confidentiality agreement.

The Mediator/Facilitator's office made an initial analysis and ranked the offers for each market on a priority basis. A total of 45 bids for the 13 RKO stations involved in the comparative process were received. At that time, I declined to name the bidders or the offered price at the request of the parties to the proceeding although one of the trade press reporters did obtain and publish this information the following week. Because such an extensive period of time was provided for the submission of third party bids, I urgently requested the inside parties to arrange among themselves to call meetings of all parties, including RKO and a Mediator/Facilitator, at the earliest possible date for each market in order to establish the negotiation procedure which would follow.

F. Notification to the Commission Concerning Filings Made Pursuant to 1.65

In an effort to keep the Commission apprised of pertinent matters in the settlement process, I submitted a "Notification To The Commission" on November 21, 1986, stating that it was the opinion of the Mediator/Facilitator that the Commission intended that filings required to be made pursuant to 1.65 of the Commission's Rules and other such required filings in the nine comparative proceedings need not be submitted until the Commission issues an appropriate order either approving settlement proposals or terminating the stay action.[43]

G. Interim Report of the Mediator/Facilitator

In my Interim Report of November 26, 1986, in addition to apprising the Commission of the progress of the settlement negotiations, I noted two obstacles requiring resolution before there was any hope for a comprehensive settlement in the public interest: (1) the division between RKO and the competing applicants of the proceeds from sale of the 13 broadcast properties; and (2) the division of any sale price among the competing applicants. [44] In order to overcome those obstacles and move all of the parties towards the Commission's desired goal of a comprehensive settlement and end of litigation, I made two recommendations: (1) that the Commission take expeditious action on the proposed KHJ-TV settlement agreement at an early date; and (2) that should litigation be resumed in any proceeding as a result of a stalemate occurring in any market, the Commission should expedite the entire process thereby quickly and effectively resolving the issue of the best qualified comparative applicant.[45]

H. Commission By Direction Letter

In response to the recommendation made in the Interim Report, the Commission in a By Direction Letter on December 19, 1986, stated that it would be inappropriate to act on the KHJ-TV settlement agreement prior to a report on the developments of negotiations by January 9, 1987, the date on which the Mediator/Facilitator anticipated knowing the outcome of negotiations following the the third party bidding process.[46] Thus, the Commission requested a futher report from the Mediator/Facilitator as soon after January 9 as possible so as to inform the Commission of the status of each of the pending settlement negotiations.[47]

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[43] Notification to the Commission (submitted November 21, 1986). See Appendix IX.

[44] Interim Report of the Mediator/Facilitator (submitted November 26, 1986) at pp. 8-9.

[45] Id. at 9-10.

I. Supplemental Report of the Mediator/Facilitator

On January 16, 1987, I filed the requested Supplemental Report advising the Commission that: (1) no further progress was possible in the Fort Lauderdale, Florida and San Francisco, California proceedings; and (2) in all other proceedings discussions and negotiations were ongoing.[48]

J. Negotiations

Negotiations since the initial settlement meeting of September 25, 1986, were intense in all markets. While there has been only one settlement agreement reached, there was some progress in most markets. There were numerous face-to-face meetings and negotiation sessions on a market-by-market basis with and without a Mediator/Facilitator present both in and out of Wasington, D.C. Some meetings included counsel while others were attended only by principals. There was constant and continual person-to-person telephone communication as well as occasional conference telephone conversations. The Mediator/Facilitator's office received between 20 and 40 telephone calls per day. Calls to the Mediators' home were common at nights and on weekends and holidays. Letters, memoranda, and other written communication were passed on a regular basis.

IV. Results

Following is a market-by-market analysis of the results of the mediation process as of midnight, January 31, 1987. In view of the collapse of the KHJ-TV settlement contract no Commission decision needs now to be made. Unless the Commission is formally advised to the contrary within the next two weeks, it should be assumed that all proceedings should be resumed at the point where they were halted on September 10, 1986. The Mediator does not recommend further extensions be granted while negotiations continue in any market, nor does the mediator plan to file supplemental reports unless requested to do so.

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[46] By Direction Letter, FCC 86-551 at 1 (released December 31, 1986). *See* Appendix XI.

[47] *Id.*

[48] Supplemental Report of the Mediator/Facilitator (submitted January 16, 1987). *See* Appendix XI.

A. Bethesda/Washington (WGMS-(AM & FM))

As this report is being prepared, the final outcome in Bethesda is not known. One outside party did obtain the concurrence in principle of all competing applicants for withdrawal of their applications if RKO can agree to the amount of the payment to RKO. A critical complicating factor in the Bethesda settlement discussions was the extremely high value of the AM antenna site in the vicinity of the Montgomery Mall Shopping Center, and thus, the future ownership of that property. RKO and the buyer are currently negotiating on this matter. See Appendix XIV.

B. Boston (WRKO & WROR-FM)

As this report is being prepared, the final outcome in Boston is not known. One competing applicant has obtained written concurrence of all other competing applicants for withdrawal of their applications if RKO can agree to the amount of the payment to RKO. RKO and the buying applicant were continuing to negotiate as the mediation period ended.

Ken Nash of Nash Communications is singled out for particular praise for his continued assistance in working with the mediators to bring about a settlement in Boston. He frequently served as a local contact point for all the parties throughout weeks of hard negotiations.

C. Chicago (WFYR-FM)

Settlement discussions in Chicago have apparently failed. One of the competing applicants together with an outside entrepreneur, has attempted to "buy out" the others. While an initial agreement was apparently reached at one point, applicants later recanted or failed to obtain agreement of their own partners. Even if all applicants manage to reach agreement it is unclear that the amount which may be proposed to RKO will be acceptable. Further progress in Chicago appears to be unlikely.

D. Fort Lauderdale (WAXY-FM)

As previously reported in the Supplemental Report of the Mediator/Facilitator, one of the competing applicants, Laudersea Broadcasting Company, declined to further pursue settlement discussions. No further progress in Ft. Lauderdale appears to be possible.

E. Los Angeles TV (KHJ-TV):

While not part of this mediation process, it is appropriate to note that two days before the mediation period ended, Westinghouse announced that it had decided not to extend the January 31, 1987, deadline on its offer to purchase KHJ-TV. The offer had originally been announced November 5, 1985 and the settlement agreement was filed with the Commission on February 5, 1986. Commission action on the transfer application had been pegged to the conclusion of this mediation process.

RKO has advised the Mediator that it intends to pursue another settlement agreement in the case of KHJ-TV. The future outcome of that effort is unclear at this time.

F. Los Angeles Radio (KHJ & KRTH(FM)):

As this report is being prepared, the final outcome in Los Angeles Radio is not known. One competing applicant has advised the Mediator that it plans to merge with a "well known group broadcaster" and plans to make an offer to RKO if all other competing applicants agree to withdraw upon payment of varied amounts. Whether the other applicants will agree, and subsequently, whether RKO will agree, appears unlikely.

G. Memphis Radio (WHBQ):

RKO advised the Mediator on Jananuary 31, 1987, that settlement of this matter had been achieved. For consideration of $750,000 to be split "70/30", with $525,000 going to RKO and $225,000 to the single competing applicant, the station is to be transferred to an outside third party, subject to FCC approval. See Appendix XIV.

Settlement was reached late in the mediation period and applications have not yet been filed. The basic policy decision before the Commission in this matter will be virtually identical to that presented earlier in the case of KHJ-TV, Los Angeles, although the sale price is a mere fraction of the price that was to be paid for KHJ-TV.

H. Memphis TV (WHBQ-TV):

Early in the process, at a meeting in Memphis, all of the parties, including RKO, appeared to reach a settlement agreement. However, one of the competing applicants later declined to accept the agreement.

Late in the mediation period an outside third party succeeded in obtaining the tentative written concurrence of all competing applicants to withdraw their applications if RKO could agree to the amount of the payment to RKO. On January. 31, 1987, RKO advised the Mediator that it would reject the present offer. While another offer remains on the table, further progress in Memphis would seem difficult to achieve.

I. New York (WOR & WRKS-FM):

Negotiations were on-going in New York as the mediation period concluded. One competing applicant twice achieved the tentative concurrence of the other competing applicants and RKO in an effort to buy the stations. Both times, settlement came "off track" over procedural and financial details raised by the buying applicant or concerns regarding payments to applicants viewed as less qualified by one of their peers.

Special note should be taken of the heroic efforts of one principal (Howard Squadron, Esq.) of S/G Communications who worked tirelessly in New York to help achieve settlement. As this report is being prepared, Mr. Squadron was attempting to obtain agreement of all the parties to an offer made by an outside third party. The future likelihood of settlement in New York is unclear.

J. San Francisco (KFRC(AM)):

Settlement discussions in San Francisco have apparently failed. One of the competing applicants offered to buy the station at a price that was considered too low by both RKO and the other applicants. That potential buyer appeared unwilling to move to the "sell side" of the table. Additionally, one of the other competing applicants was demanding a price for withdrawal which would clearly have doomed further negotiations. No further progress in San Francisco appears to be possible.

V. Recommendations

A. Extension of the Federal Rules of Evidence

At footnote 12 of the Commission's September 12, 1986, Order, it was stated that Federal Rules of Evidence, Rule 408, 28 U.S.C.408, would apply to "evidence of conduct or statements made during the course of these settlement negotiations."

It is recommended that the Commission extend or clarify this determination to assure that any projected agreements reached or withdrawal commitments made, whether verbally or in writing, are likewise not admissible in any subsequent RKO proceedings.

The mediator fears that some competing applicants may attempt to suggest that other applicants who agreed "to take less" in any settlement negotiations have somehow admitted they are "less qualified." The entire mediation process, including all discussions, statements, tentative agreements, reports, etc., should be inadmissible in future litigation.

B. Expedite All RKO Litigation

In the Interim Report of the Mediator/Facilitator, I recommended certain actions which could expedite the various RKO proceedings. Now that the mediation process has run its course it would appear appropriate to pursue any avenues which hold the possibility of such expedition.

Therefore, I recommend the Commission promptly lift the stay in any and all proceedings which have not settled within the next two weeks with instructions to the Administrative Law Judge's that they proceed expeditiously to conclude the proceedings and issue Initial Decisions promptly. The Commission should also direct that appeals from the Partial Initial Decisions be made directly to the Commission, by-passing the Review Board. The Commission would then be in a position to determine rapidly which of the competing applicants is "best qualified."

I strongly recommend expedited consideration of the Memphis AM settlement and any others that may occur after this report is filed. The policy issues will have to be addressed sooner or later and the parties in all the proceedings need to receive Commission guidance if they are to be expected to work toward settlement in the future or, alternatively, apply their resources to the hearing process.

There may well be other acceptable steps which can be taken to expedite the process. Any procedure which will provide finality will certainly inure to the public interest.

C. Strengthen FCC Efforts to Abolish the Comparative Hearing Process

Only one enemy of the public interest stands out crystal clear at the end of my involvement in this exercise. That is the comparative renewal process itself. It is difficult to imagine a more harmful contrivance of government than one which would submerge more than a dozen broadcasting voices in nine major cities of the United States in a situation of perpetual limbo for years on end with no clear vision of the future. The present licensee has no choice but to siphon off revenue to continue litigation ad infinitum. It can neither add nor subtract broadcasting properties to strengthen its position in the marketplace. Programming to the public is bound to suffer. Good management and talent is difficult to hire or retain under such a cloud, and competing applicants are encouraged to enter the fray and begin paying the cash they might later use to operate the stations for legal fees to first obtain them.

The entire process is a tragedy and one that no one seems to be able to stop--not the Commission, not RKO, not the applicants. If the RKO saga is doomed to continue on a treadmill of litigation, so be it. But every effort to rid the public of this offensive process called comparative renewal should be made. The public interest demands it.

VI. Acknowlegments

The mediation process has been extremely difficult and very time consuming. Certain individuals have helped to make it possible and at times, even pleasant.

Of the 29 individual counsel for the applicants the Mediator has found almost all of them to be extremely helpful to the process. Few have violated our initial commitment to conduct these negotiations in private. The Mediator has developed considerable respect for the quality, sincerity, and good-faith efforts of the communications bar in general.

The effort took about 70 percent of my own time from Bureau management. Bill Johnson and the rest of my front office staff took most of that burden and it is sincerely appreciated. Ed Minkel, our Managing Director, provided full administrative support and resources whenever they were needed.

Rod Porter who also served as a Mediator devoted himself to this process at a time when his wife was busy delivering their second child. My thanks to Rod and my apologies to his wife, Kathy.

And, Don McClellan did excellent staff work and brought to the process his own level of enthusiasm that often kept us all from sinking into pools of depression. He has a great future in communications law.

There are no regrets when you know you did all you could to succeed in a task. Our failure to achieve settlement in most of the markets was not for the lack of trying. My appreciation to the Commission for giving me the opportunity to try.

James C. McKinney
James C. McKinney

D. McClellan/R. Porter/J. McKinney

APPENDICES

Appendix I: The Commission's RKO Settlement Proceeding Order

Appendix II: News Release

Appendix III: Oral Presentation By Office of General Counsel

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Appendix V: Transcript of Press Briefing

Appendix VI: Copy of Rec. 86-3: Agencies' Use of Alternative Means of Dispute Resolution

Appendix VII: Notification of Separation/Announcement of First Meeting
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Appendix XIV: Wall Street Journal, Feb. 3, 1987, p. 49, "Gen Corp Reaches Tentative Accord on Sale of Stations"

SERVICE LIST

Appendix I

The Commission's RKO Settlement Proceeding Order

Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 86-383
36873

In re Applications of	)	
	)	
RKO GENERAL, INC. (KHJ-TV)	)	DOCKET NO. 16679
Los Angeles, California	)	File No. BRCT-58
	)	
For Renewal of License	)	
	)	
FIDELITY TELEVISION, INC.	)	DOCKET NO. 16680
Norwalk, California	)	File No. BPCT-3655
	)	
For Construction Permit for New	)	
Television Broadcast Station	)	
	)	
RKO GENERAL, INC. (WHBQ-TV)	)	MM DOCKET NO. 84-1212
Memphis, Tennessee	)	File No. BRCT-790402LC
	)	
and Associated Dockets	)	MM DOCKET NOS. 84-1213; 84-1214;
	)	84-1218 to 84-1222; and 84-1224
	)	
RKO GENERAL, INC. (WGMS)	)	MM DOCKET NO. 84-1148
Bethesda, Maryland	)	File No. BR-1403
	)	
and Associated Dockets	)	MM DOCKET NOS. 84-1149 to 84-1151;
	)	84-1159; 84-1162; 84-1163; 84-1166;
	)	84-1167; 84-1170 to 84-1173; and
	)	84-1178
	)	
RKO GENERAL, INC. (WRKO)	)	MM DOCKET NO. 84-1057
Boston, Massachusetts	)	File No. BR-953
	)	
and Associated Dockets	)	MM DOCKET NOS. 84-1058; 84-1059;
	)	84-1061; 84-1063 to 84-1065;
	)	84-1070; 84-1072; 84-1076 to
	)	84-1078; 84-1080; 84-1081; and
	)	84-1083; and 84-1084
	)	
RKO GENERAL, INC. (WYFR-TV)	)	MM DOCKET NO. 84-1085
Chicago, Illinois	)	File No. BRH-790801A3
	)	
and Associated Dockets	)	MM DOCKET NOS. 84-1086; 84-1089;
	)	84-1094; and 84-1096
	)	
RKO GENERAL, INC. (WAXY(FM)	)	MM DOCKET NO. 84-1112
Ft. Lauderdale, Florida	)	File No. BRH-781002WR
	)	
and Associated Dockets	)	MM DOCKET NOS. 84-1113; 84-1114;
	)	84-1116; and 84-1118
	)	
RKO GENERAL, INC. (KHJ)	)	MM DOCKET NO. 84-1184
Los Angeles, California	)	File No. BR-22
	)	

and Associated Dockets	))))	MM DOCKET NOS. 84-1186 to 1188; 84-1190; 84-1195; 84-1196; 84-1198; 84-1199; 84-1201; 84-1203; and 84-1207
	)	
RKO GENERAL, INC. (WHBQ) Memphis, Tennessee	))	MM DOCKET NO. 84-1051 File No. BR-790402C2
	)	
and Associated Docket	)	MM DOCKET NO. 84-1053
	)	
RKO GENERAL, INC. (WOR) New York, New York	))	MM DOCKET NO. 84-1122 File No. BR-177
	)	
and Associated Dockets	))))	MM DOCKET NOS. 84-1123; 84-1124; 84-1126; 84-1128; 84-1132; 84-1133 to 84-1135; 84-1138 to 84-1140; and 84-1146
	)	
RKO GENERAL, INC. San Francisco, California	))	MM DOCKET NO. 84-1098 File No. BR-43
	)	
and Associated Dockets	))	MM DOCKET NOS. 84-1099 to 84-1101; 84-1110; and 84-1111

MEMORANDUM OPINION AND ORDER

Adopted: September 10, 1986   Released: September 12, 1986

By the Commission:

1. Now pending before the Commission are a series of pleadings pertaining to resolution and settlement of the KHJ-TV, Los Angeles, California comparative renewal proceeding. One of these was filed by RKO General, Inc. (RKO) and Fidelity Television, Inc. (Fidelity) on June 2, 1986, and is a request for waiver of Section 1.301(b) of our Rules, 47 C.F.R. 1.301(b), which precludes appeal of interloctory rulings absent the permission of the presiding Administrative Law Judge (ALJ). 1/ In his underlying Order, FCC 86M-1394, released April 24, 1986, ALJ Kuhlmann denied the joint request of RKO and Fidelity to certify to the Commission their proposed settlement agreement designed to terminate the comparative phase of the KHJ-TV, Los Angeles, California proceeding. By Order, FCC 86M-1738, released May 23, 1986, the ALJ denied RKO and Fidelity's request for permission to file an appeal of his earlier Order. The instant motion for waiver followed. Also pending before the Commission is a Petition for Leave to File Applications, Approval of Settlement Agreement and Related Relief filed February 5, 1986 by RKO, Fidelity, and Westinghouse Broadcasting and Cable, Inc. (Westinghouse). 2/

Background

2. The KHJ-TV comparative renewal proceeding had its genesis in 1965, when RKO filed its application for renewal of that station's license. Since that time RKO and its adversaries have expended considerable funds, consumed countless hours in litigation and generated an endless cloud over the KHJ-TV license. There have been three court opinions on the case. 3/ In response to the Court's latest order, we remanded the KHJ-TV proceeding to the ALJ for further evidentiary hearings on RKO's overall basic qualifications as a result of its disqualification as the licensee of WNAC-TV, Boston, Massachusetts. *Order*, 94 FCC 2d 879, released June 8, 1983. See *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 and 78 FCC 2d 355 (1980), *affirmed in part and reversed and remanded in part*, *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927, 457 U.S. 1119 (1982).

3. To expedite matters, we bifurcated the KHJ-TV proceeding, with Phase I focusing exclusively on resolution of RKO's basic qualifications. Following completion of this aspect of the case, the ALJ would then be in a position to commence Phase II of the KHJ-TV proceeding, which includes evaluation of Fidelity's basic qualifications and consideration of the comparative qualifications of both RKO and Fidelity. Since questions of RKO's basic qualifications applied equally to all of RKO's licenses, we made the applicants competing for RKO's thirteen other broadcast stations 4/ parties to the KHJ-TV proceeding. 5/ Findings and conclusions reached in the KHJ-TV proceeding regarding RKO's qualifications would then be applied uniformly in all proceedings involving RKO. 6/

4. RKO and Fidelity now seek waiver of Section 1.301(b) of our Rules to appeal the ALJ's rulings on the ground that their proposed settlement agreement raises basic and far-reaching policy questions which can only be resolved by the Commission. They assert that approval of their proposal is in the public interest and that it is consistent with Section 311(d) of the Communications Act, which authorizes settlements in comparative renewal proceedings and takes precedence over other policies which appear to disfavor their proposal. Adwave and the other objecting parties contend that the ALJ properly applied existing law and policies in disposing of RKO and Fidelity's request for certification and the proposed settlement agreement. They also argue that grant of RKO and Fidelity's waiver request and approval of the settlement proposal will adversely impact on their own comparative cases against RKO.

Discussion

5. The proposed settlement agreement contemplates the simultaneous dismissal of RKO's renewal application, grant of Fidelity's construction permit application, as amended to specify RKO's facilities, grant of a license to Fidelity, merger of Fidelity into Westinghouse and immediate transfer of Fidelity's newly obtained license to Westinghouse. RKO, Fidelity and Westinghouse have jointly requested the Commission to assert jurisdiction over all aspects of the settlement agreement so that a comprehensive determination can be reached. They argue that the proposed settlement agreement encompasses the transfer of all of RKO's licenses and equipment associated with the operation of KHJ-TV, as well as the application for transfer of control to Westinghouse and a request for new call letters representing the new licensee. To expedite matters, petitioners have proffered for acceptance all

applications 7/ needed to implement the settlement agreement. Petitioners urge that these applications be accepted at this time and a common pleading cycle be established so that comments on all aspects of the settlement agreement can be filed at one time.

6. Upon preliminary review, the proposed settlement agreement has some appeal. The public interest would be greatly benefited by termination of the 20 year old KHJ-TV proceeding, removal of the cloud over the KHJ-TV license and grant of the KHJ-TV license to an unquestionably qualified broadcaster. However, the agreement leaves open the prospect of many more years of litigation, first to reach a final decision regarding RKO's overall qualifications to remain a Commission licensee and second to determine which of the many competing applicants will ultimately prevail in their ongoing comparative cases, not to mention further controversy as to the agreement itself. As to the latter, all parties concur that the agreement raises serious and difficult policy questions bearing on the Commission's execution of its public interest responsibilities. These factors would have to be weighed against any benefits to be gained from the proposed settlement. We are not now [illegible] to reach a final determination on the merits of the settlement agreement as proposed. However, we are persuaded, based on all of the circumstances set forth herein, that a sufficient showing has been made to warrant a waiver of Section 1.301(b) of the Rules and acceptance of the tendered applications. 8/ This will enable us to give full consideration to the merits of the proposed settlement agreement in a subsequent order. 9/

7. At the same time we share RKO and Fidelity's concern that this prolonged litigation should end. Our perspective of the relevant public interest factors, however, is broader than that suggested by those parties. Before reaching a determination on the merits of the KHJ-TV settlement, therefore, we will take steps to facilitate, and afford the parties an opportunity to reach, a comprehensive settlement of all of the outstanding RKO cases involving 69 competing applications. A comprehensive settlement would save the Commission and the parties years of litigation and incalculable time and money.

8. We will of course leave the form of any settlement to the parties themselves, thereby providing them with the greatest latitude possible to fashion a comprehensive settlement in the public interest. In this regard, we do not rule out any proposed settlement that will be agreeable to the parties involved, including the possible participation of non-parties (*i. e.* "white knights"), if such entities' participation will serve the greater public interest of bringing all of the RKO proceedings to an expeditious conclusion. We will, of course, reach a decision on the merits of any settlement after we are presented with a specific proposal. To assist the applicants' settlement efforts, we are directing the parties to select a mediator/facilitator. 10/ Along these lines, we suggest that the Chief of the Mass Media Bureau, James C. McKinney, and his staff would be the best choice to fill this role, although the ultimate determination lies within the discretion of the parties to these proceedings. Consistent with our objective, authority is granted the mediator/facilitator to convene meetings, assist the parties in reaching amicable settlements and keep the Commission apprised of developments in a manner consistent with the *ex parte* rules. *See* Sections 1.1201 *et seq.* of the Commission's Rules. In carrying out these responsibilities, the mediator/facilitator can solicit the assistance of the

National Mediation and Conciliation Service and avail himself of their expertise and personnel in order to bring these proceedings to an expeditious conclusion.

9. Since it is our concern to commence settlement negotiations as expeditously as possible, we will direct Mr. McKinney, if possible, to convene a meeting with all parties or their attorneys within 15 days of the release date of this Order. At this meeting, to be chaired by Mr. McKinney, the parties are to choose the person they wish to serve as mediator/facilitator by majority vote. In the event that Mr. McKinney is not chosen as mediator/facilitator, the parties are to bear the expense of any compensation to be paid to the person so named. Mr. McKinney, if not selected, is nonetheless to remain a participant in the settlement discussions process. Regardless of whether he is selected, Mr. McKinney is to submit a written report to the Commission within 75 days of the release date of this Order apprising the Commission of the progress of settlement negotations and to submit a final written report by January 31, 1987, detailing the results of the settlement negotiations. 11/ In the event Mr. McKinney is selected as the mediator/facilitator, out of an abundance of caution and in order to facilitate settlement discussions, we are also directing Mr. McKinney and those members of his staff who will be functioning as mediators/facilitators to separate themselves from overseeing the Bureau's trial staff in any subsequent proceedings involving these matters. Mr. McKinney, and the members of his staff involved in the negotiations, are also not to participate in any way as a formal party or decision makers, and are to strictly observe the *ex parte* rules. Bureau personnel not so identified will continue to perform the functions of a party in all subsequent RKO proceedings and will be totally separated from the Bureau's personnel acting as mediators/facilitators.

10. During the time these settlement efforts are occurring, Phase I of the KHJ-TV case dealing with resolution of RKO's basic qualifications shall proceed in a manner consistent with our previous orders. In the event settlements are not reached and evaluation of RKO's qualifications is still required, this course of action will expedite the overall adjudicatory process and is consistent with the views of RKO and Fidelity expressed in the latest round of comments filed. At the same time we will direct the presiding ALJs to hold in abeyance the nine other RKO proceedings, including the filing of exceptions to Partial Initial Decisions, pending further Commission order. This will allow the parties to devote their undivided energies to this settlement effort in a non-adversarial environment. 12/

11. ACCORDINGLY, IT IS ORDERED, That the Request to Waive the Page Limitation of Section 1.301(c) and the Motion for Waiver of Section 1.301(b) of the Rules to Permit Interlocutory Appeal, both filed June 2, 1986 by RKO General, Inc. and Fidelity Television, Inc. ARE GRANTED.

12. IT IS FURTHER ORDERED, That the Appeal from Presiding Judge's Order of April 24, 1986, filed June 2, 1986 by RKO General, Inc. and Fidelity Television, Inc. IS ACCEPTED.

13. IT IS FURTHER ORDERED, That the Motion for Waiver of Page Limitation filed June 12, 1986 by Adwave Company, Boston Radio Corporation, East Lake Communications, Inc., Magna Media Corporation and Potomac Broadcasting Corporation IS GRANTED and their Opposition to Motion for Waiver

of Section 1.301(b) IS ACCEPTED.

14. IT IS FURTHER ORDERED, That the Memorandum in Support of Appeal and Request for Approval of Settlement filed June 3, 1986 and the Reply Memorandum filed June 23, 1986 by Westinghouse Broadcasting and Cable, Inc. ARE ACCEPTED.

15. IT IS FURTHER ORDERED, That the Petition for Leave to File Applications, Approval of Settlement Agreement and Related Relief filed February 5, 1986 by RKO General, Inc., Fidelity Television, Inc. and Westinghouse Broadcasting and Cable, Inc. IS GRANTED to the extent indicated in note 8, herein, and IS DEFERRED in all other respects.

16. IT IS FURTHER ORDERED, That James C. McKinney, Chief of the Mass Media Bureau IS DIRECTED:

(a) To convene a meeting with all parties (or their attorneys) to the ongoing RKO proceedings 13/ within 15 days of the release date of this Order, for the purpose of taking steps to attempt to reach a comprehensive settlement of these proceedings.

(b) To submit a written report to the Commission within 75 days of the release date of this Order apprising the Commission of the progress of settlement negotiations.

(c) To submit a final written report by January 31, 1987 detailing the results of the settlement negotiations.

IT IS FURTHER ORDERED, That the nine comparative proceedings, involving facilities other than KHJ-TV, SHALL BE HELD IN ABEYANCE, pending further Commission Order.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

1/ Pleadings have also been filed by Adwave Company, Boston Radio Corporation, East Lake Communications, Inc., Magna Media Corporation and Potomac Broadcasting Corporation; by New South Media, Riggs Radiocasters and Laudersea Broadcasting; by Radio Broadcasters Limited Partnership; by Westinghouse Broadcasting and Cable, Inc.; and by the Mass Media Bureau.

2/ Westinghouse is not a party to this proceeding. Under the terms of the proposed Settlement Agreement, which stands to expire if not approved by the Commission by January 31, 1987, Westinghouse would become the eventual licensee of Channel 9, Los Angeles. On February 20, 1986 Adwave Company, Boston Radio Corporation, East Lake Communications, Inc., Magna Media Corporation and Potomac Broadcasting Corporation filed a joint response to the

Petition for Leave to File Applications. These parties are applicants in other comparative renewal proceedings involving RKO and are participating in the KHJ-TV Los Angeles proceeding for the limited purpose of adjudicating RKO's basic qualifications. RKO, Fidelity and Westinghouse filed a joint reply to Adwave's response on March 4, 1986.

3/ *Fidelity Television, Inc.* v. *FCC*, 502 F.2d 443 (D.C. Cir. 1974); *Fidelity Television, Inc.* v. *FCC*, 515 F.2d 684, *rehearing denied*, 515 F.2d 703 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975); and *RKO General, Inc.* v. *FCC*, 670 F.2d 215, *cert. denied*, 456 U.S. 927, 457 U.S. 1119 (1982).

4/ These 13 broadcast facilities are: WHBQ-TV and WHBQ, Memphis, Tennessee; WOR and WRKS(FM), New York, New York; WRKO and WROR(FM), Boston, Massachusetts; KHJ and KRTH(FM), Los Angeles, California; WGMS, Bethesda, Maryland; WGMS-FM, Washington, D. C.; KFRC, San Francisco, California; WAXY(FM), Ft. Lauderdale, Florida; and WFYR(FM), Chicago, Illinois.

5/ *RKO General, Inc. (KHJ-TV)*, FCC 83-342, released July 19, 1983, *recon. denied*, 96 FCC 2d 1161 (1984).

6/ *RKO General, Inc. (WHBQ-TV)*, FCC 83-341, 54 Rad. Reg. 2d (P&F) 717 (1983), *recon. denied*, 96 FCC 2d 1161 (1984).

7/ RKO, Fidelity and Westinghouse have tendered the following applications for acceptance:

(1) License for Channel 9, Los Angeles;

(2) Construction permit and license for auxiliary antenna;

(3) Licenses for various broadcast auxiliary services (Television Pickup Station, Remote Pickup Mobile Relay System, Low Power Auxiliary Station, Television Studio - Transmitter Links, Remote Pcikup Base/Mobile System, and TV Relay Stations);

(4) License for domestic satellite earth station;

(5) License for business radio services;

(6) Call sign change to KGPW;

(7) Transfer of control of Fidelity to Westinghouse.

8/ *Cf. Communications Satellite Corp.*, 23 Rad. Reg. 2d (P&F) 286 (1971).

9/ In this regard, the Mass Media, Private Radio and Common Carrier Bureaus are directed to accept the applications listed in footnote 7, *supra*, and to set a common pleading cycle for any submissions relating thereto.

10/ Our determination to rely on a mediator/facilitator to encourage the parties to reach a settlement in the public interest derives from the *Manual for Complex Litigation* (See, for example, Sections 1.21, 1.46 and 3.20). The *Manual* has previously been relied upon by the Commission in these proceedings (*See Order*, *supra*, 96 FCC 2d at 1165) and has proven invaluable in establishing procedures appropriate for these complex RKO cases. Our action is also consistent with Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, adopted by the Administrative Conference of the United States on June 20, 1986.

11/ The written reports concerning the settlement negotiations are to be served on all parties pursuant to the provisions of our *Ex Parte* rules.

12/ Federal Rules of Evidence, Rule 408, 28 U.S.C. 408, will apply to these discussions. Accordingly, evidence of conduct or statements made during the course of these settlement negotiations will not be admissible in any possible, subsequent RKO proceedings.

13/ *See* n.4, *supra*.

Appendix IV

Transcript of Commission Discussion

Commission Discussion

September 10, 1986

Chairman: All right, sir, that permission is granted. Commissioners, are there any comments or questions? Commissioner Quello.

Commissioner Quello: I've been here for over 12 years and the RKO decisions have been bugging us all that time. I think this is a very creative, novel approach. It works! I have great confidence in Mr. McKinney. I know he does the impossible immediately, but miracles may take a little longer, Jim, and I think it will take that to get this thing going. I hope it works. It's certainly worth trying and without judging the merits of this particular issue, I just want to have a little history of what happened before the Commission in 1980. By a very close 1 vote margin; 4 to 3 at that time, we voted against the license renewal of WNAC-TV Boston on the basis that RKO was unqualified. In doing this remember they had to overturn the judgment of an Administrative Law Judge and the recommendation of the Broadcast Bureau. Our own Broadcast Bureau and the Administrative Law Judge at that time found RKO qualified. I characterized it at that time as gross bureaucratic overkill. It represented confiscation. At that time I maintained a judgment that this whole decision could cost RKO $600 million and 1 or 2 of the trade papers thought that was a gross exaggeration, and just to put this in proper perspective, when you lose a Boston station today, like RKO has already lost, is 400 million, one wallop, and then in the meantime, when we have had law judges tied up, our own facilities tied up, and our lawyers working on this, and this is pretty far to go to a case at that time you can even come up with a criminal or civil indictment. Here some action or other 4 out of 7 Commissioners decided to go ahead with this type of punishment and I think they have been punished enough. I think the punishment should fit the crime and I hope we can come to some kind of reasonable settlement -- at least a good creative try.

Chairman: I thank you, Commissioner Quello. Are there any other comments on this item, Commissioners? Commissioner Patrick.

Commissioner Patrick: Yes, Chairman. Thank you. I would only re-emphasize the point Commissioner Quello made initially and that is by this Order we didn't reach any conclusion on the merits of the proposed solution to the KHJ matter nor do we pre-judge any possible settlement of the RKO matter generally. Rather we attempt to explore the possibilities or will explore the possibility of a generic settlement, and I think that, as Commissioner Quello said, is well worth a try. Our principal motivation here, of course, Mr. Chairman is the public interest, and the public is not well served by over 20 years litigation with respect to a number of facilities that ought to be serving the public without that sort of cloud hanging over it or them. We hope that the parties will enter into these discussions in good faith and make every effort to present to the Commission something that we can take a good hard look at at that time.

Chairman: Thank you, Commissioner Patrick. I want to thank you and commend you for your very good suggestions which I think made this item a much better item and I really thank you for that very much, and I for my part agree with what both of you have said. Litigation that has gone on almost 21 years, actually now, is litigation that has gone too long, and I want to stress also, as you have, this in no way means there's any pre-disposition on the merits, but like all stewards of litigation, including judgments in district courts, where we can foster settlements especially in a case like this, it seems to me we ought to make the try. Having said that, what we've done here is simply set up a mediation, not an aribtration, but a mediation mechanism which is designed to attempt to narrow differences and to foster possible successful settlement negotiations. No party should feel in anyway obligated if it feels its interests are not served by entering into a formal settlement agreement to do so. But if indeed through these discussions a settlement could be achieved it seems to me that would be something that we would then want to look at in the context of ending litigation. We still have some difficult policy decisions we would then have to reach at that point which you touched upon in your presentation, although more specifically. If there are no other comments on this item, Commissioners all in favor say "Aye" those opposed "No." The Aye's have it, so ordered.

DAEN-CCJ

ALTERNATIVE DISPUTE RESOLUTION UNDER AGREEMENTS FOR COST-SHARED WATER RESOURCES PROJECTS

Given its success with alternative dispute resoluion (ADR) in contract and procurement matters, the Corps of Engineers has sought to expand the use of ADR to other arenas. ADR techniques, for example, have been applied in the Corps' regulatory and permit program. Within the past year, the Corps has made ADR available in a completely new field: cost-shared water resource development.

Public Law 99-88, the 1985 Supplemental Appropriations Act, provided funds for the Corps of Engineers to initiate forty-one new water projects if the Corps and non-Federal project sponsors entered into cost-sharing agreements by June 30, 1986. By allowing water projects to move forward under new cost-sharing formulas, P.L. 99-88 signalled the beginning of the end of a dispute over water resource development that had existed since 1976. If agreements could be reached with non-Federal project sponsors, the efficacy of the new cost-sharing principles would be demonstrated to a still-wary Congress, and permanent legislation making cost-sharing applicable to all new projects could be enacted.

The Corps successfully concluded cost-sharing agreements by June 30 in all but one instance in which agreement was sought. Less than five months later, Congress enacted into law the Water Resources Development Act of 1986, P.L. 99-662. Under the new law, virtually any civil works project within the Corps' jurisdiction must be constructed in cooperation with a non-Federal sponsor that is responsible for between twenty and sixty percent of that project's cost. The cost to the project sponsor generally includes the provision of all real estate interests needed for the project; other non-Federal obligations include operating and maintaining the project after completion (except for commercial navigation projects) and agreeing to indemnify the Corps for damage claims not resulting from the negligence of the Corps or its contractors.

Mandatory cost-sharing, and the concomitant sharing of risk and responsibility, is the new reality for the Corps and its non-Federal sponsors. Legally required cooperation, however, is not necessarily free from dispute. In fact, because both parties to cost-sharing agreements usually are sovereign entities dominant in their own spheres, the potential for serious disagreement seems great. Issues concerning project modifications, construction schedules, valuation of real estate interests, or even the choice of accounting methodologies will arise in almost all cost-shared projects. How those issues ultimately get resolved will, in large part, determine whether cost-sharing succeeds or fails.

Because ongoing cooperation is essential in the construction and operation of major water projects, and because cost-sharing in general will continue to be scrutinized closely by Congress and interest groups, some type of dispute-resolution mechanism needs to be available to address the issues certain to arise under cost-sharing agreements. The cost, divisiveness, and negative publicity associated with litigation clearly are incompatible with the goâls of cost-sharing; thus, the Corps cannot afford to have disputes be settled in traditional judicial forums. Alternative dispute resolution, on the other hand, seems especially compatible with the principles underlying cost-sharing and cooperative agreements between public entities.

To ensure that ADR methods are applied to disputes arising under project cost-sharing agreements, the Corps proposed that the following provision be included in each agreement negotiated pursuant to P.L. 99-88:

> Before any party to this Agreement may bring suit in any court concerning an issue relating to this Agreement, such party must first seek in good faith to resolve the issue through negotiation or other forms of non-binding alternative dispute resolution mutually acceptable to the parties.

Project sponsors uniformly accepted the ADR provision; all thirty-two agreements reached under P.L. 99-88 contain it. Moreover, project sponsors seemed pleased that ADR is required before suit may be brought under the agreements. A few, in fact, asked that the word "non-binding" be eliminated from the provision, in effect inviting the prospect of binding arbitration. Because the Federal Government is not authorized to enter agreements for binding arbitration, the proposed change was not adopted. Nevertheless, project sponsors agreed that any form of ADR was preferable to traditional litigation.

The ADR provision of the Corps agreements is deliberately vague: it does not specify a particular form of ADR, but merely requires an attempt to use some form of ADR before resorting to the court system. The Corps considered specifying various ADR options, such as proceedings before the Engineer Board of Contract Appeals or mini-trials before a neutral party mutually selected by the Corps and the project sponsor, but in the end recognized that the unlimited number of types of disputes that could arise precluded the prior selection of a particular form of ADR mechanism. By permitting the parties to choose an ADR forum after learning what type of dispute exists, the ADR provision seeks to preserve the availability of the "best" mechanism for resolving a particular dispute, whatever that might be.

Because of the clear value of the ADR provision and its ready acceptance by project sponsors, the Corps will seek to include this provision in every local cooperation agreement it signs. Although the Corps anticipates that most disputes can be avoided by open communication between the parties, the presence of the ADR option means that the mere existence of a dispute will not automatically lead to the disabling impact of a lawsuit.

ANALYSIS AND PERSPECTIVE

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LITIGATION

Minitrial Successfully Resolves NASA-TRW Dispute

By W. Stanfield Johnson,
Sidney G. Masri,
and Dale H. Oliver

Messrs. Johnson and Oliver, partners in the Washington, D.C. law firm of Crowell & Moring, were the attorneys for TRW Inc. in the proceedings described in this article. Mr. Masri, chief trial counsel for the National Aeronautics and Space Administration, was head of the NASA trial team for the proceedings.

: Justice Robert Braucher, a distinguished contracts professor at the Harvard Law School, traditionally began his class each year with the admonition that lawyers best served clients by keeping them out of the courtroom. This admonition is currently observed by the increased use of minitrial proceedings.

Minitrials allow parties to resolve disputes while avoiding or reducing the cost and involvement of full-blown litigation. Minitrials are characterized by a variety of features, but they involve an informal, out-of-court procedure developed by the parties to provide a greatly shortened version of the trial presentation and an enhanced setting for settlement.

This process has evolved mainly in connection with complex commercial disputes.[1] Recently, however, NASA and several of its contractors undertook to resolve complex litigation through a minitrial. This experience is a first for the government and may offer a model for the future.

NASA, at the end of 1976, awarded a fixed-price contract to Space Communications Company (Spacecom).[2] The contract called for the production of a tracking and data relay satellite system (TDRSS) and related services to be provided by the contractor for a 10-year period. The satellite system will provide telecommunication linkages from NASA satellites to an earth station and back. The present value of that TDRSS contract is more than $1.5 billion.

The principal subcontractor is TRW Inc., the company responsible for providing system engineering, building the communication satellites, and providing the necessary software. The contractors will also provide automatic data processing equipment for the NASA ground station to be used in collecting and relaying the various measurement and control communications required to establish and maintain the TDRSS service. The first satellite will be launched on the space shuttle flight scheduled currently for January 1983, and is to be placed in an orbit 22,000 miles from earth.

The TDRSS system benefits NASA by increasing communication with a satellite from approximately 15 percent coverage of its orbit under the present system to 85 percent coverage under TDRSS. Replacing the present system of ground stations for earth-orbiting satellites with the single ground station used in the TDRSS system should significantly reduce NASA's [illegible]

NASA
TRW
TDRSS

Illustration by Scott von Bergener

The TDRSS contract contains a performance specification which describes the requirements of the communication system. The disputes ultimately resolved by the minitrial concerned different interpretations of the requirements of this specification.

After a series of technical discussions and negotiations, NASA issued two letters of direction to the contractors in early 1979. These letters directed certain performance and indicated the government's view that this performance was required by the contract specifications. Both Spacecom and TRW believed that this performance constituted new work which entitled them to increased compensation.

Six Issues

The letters of direction raise six basic issues. Of greatest significance in terms of dollars was NASA's requirement for continuous communications with those satellites undergoing propulsive events. The problems of providing continuous support, particularly at times of transition from stable orbits to the onset of propulsive events was particularly difficult. This problem was compounded by the government's related position, which raised a second major issue, that the spacecraft locational data which NASA provided to the contractor could be in error by up to plus or minus nine seconds. This time uncertainty required, in NASA's view, that the contractors be able to accommodate errors as to the velocity, the acceleration, and the jerk of spacecraft, while maintaining communications with the user spacecraft. The remaining four issues dealt with the software and computer capability which [illegible] contractors to provide.

The issues were highly technical and involved state-of-the-art technology. Indeed, technical representatives of the parties spent a year resolving technical disagreements about how NASA's requirements could be implemented. Disagreement persisted, however, about who had contractual responsibility and would bear the cost of this additional work.

Spacecom appealed the final decisions of the contracting officer to the NASA Board of Contract Appeals.[3] TRW joined in that appeal pursuant to a provision in its subcontract. These appeals commenced the litigation.

Scope of Litigation

Litigation of these complex issues was a herculean task. Framing the case in the complaint and answer was itself a formidable accomplishment, because of the need to understand and describe the science and technology of space communications. Shortly after document discovery began, the parties suspended litigation efforts for three months to conduct settlement discussions. These discussions were documented apart from the litigation and failed to produce a settlement. The litigation effort was restarted and extensive document discovery on both sides ensued.

The documents involved hundreds of thousands of pages of records. Indeed, NASA elected—given the scope of the documentation—to place the litigation documents discovered in a computer indexing system. Approximately 120,000 pages of documents were exchanged by the parties.

A number of depositions were no- [illegible] depositions and the government indicating its desire to take 43 depositions. Five depositions actually took place. They ranged from a week or two weeks in length and involved highly technical areas. Counsel on both sides had to have a sufficient technical understanding of the system to be able to formulate deposition questions and to prepare for defending depositions.

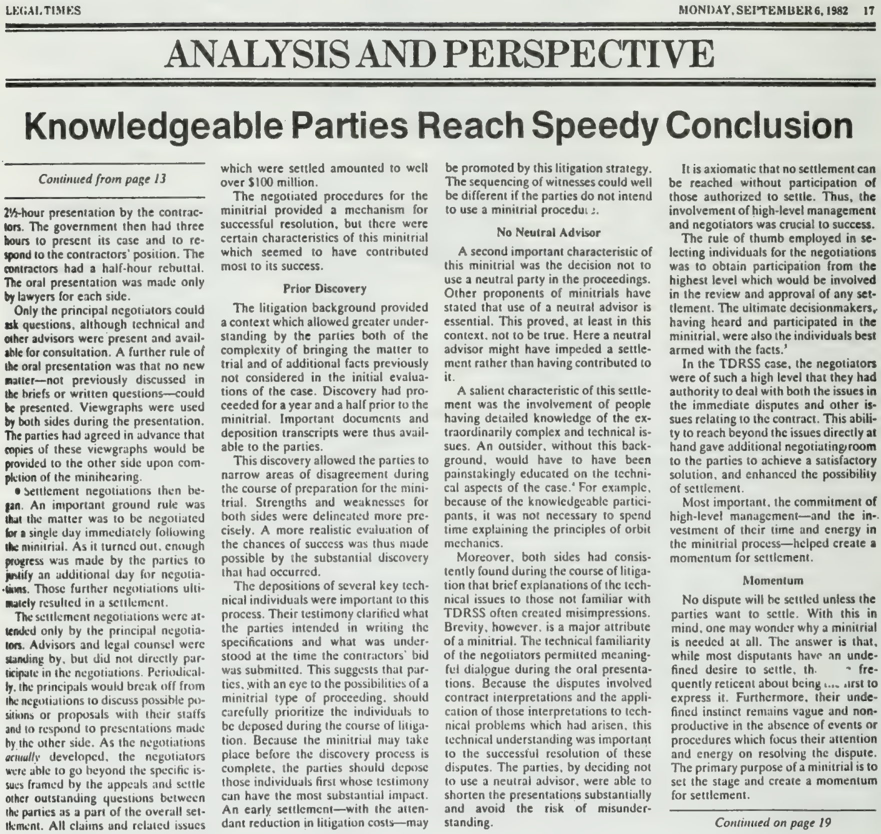
The ever-widening scope of the discovery required the hearing date set by the NASA board to be pushed back several times. At the time of the minitrial, the best estimate of the parties was that a trial was still a year away.

Minitrial Structure

In the midst of the discovery, Spacecom approached NASA with the possibility of once again undertaking to settle the disputes. A minitrial was suggested but certain preconditions were set by the parties. A cost proposal was to be submitted by the contractors, with a breakdown for the six major issues involved in the appeals. Negotiators had to be appointed for each side with written authority to settle the case. The parties required that an explicit understanding be reached as to the conduct of the minitrial and the deadlines for the various phases. And discovery—with agreement of the NASA Board of Contract Appeals—would be suspended pending the minitrial effort.

The particular minitrial procedure was the subject of negotiations between the attorneys. As negotiated, it involved five major aspects:

- First, the detailed cost proposal was submitted by the contractors. Armed with knowledge about the cost ascribed to the various issues, all parties could then apply their percentages of probable success against that dollar apportionment to derive a bottom-line assessment for settlement. The cost particularization gave all parties knowledge of the relative importance of the various technical issues being disputed.
- Shortly after submission of the cost proposal, the parties simultaneously exchanged written briefs setting forth the factual and legal positions upon which the parties relied. The briefs contained citations to the depositions and pertinent documents upon which the parties relied. These documents were set forth in appendices to the briefs. It was agreed that there would be no reply briefs.
- Several days after submission of the briefs, written questions were simultaneously exchanged by the parties. No limitation was set on the number of questions to be asked. The parties did not stipulate that there be a written response to the questions, but rather left that response for the oral minitrial. Written responses were exchanged, however, immediately after the minitrial.
- The minitrial itself was then conducted. Each side was given three hours to make a presentation of its legal case. This time was apportioned into three segments. The first was a



ANALYSIS AND PERSPECTIVE

Knowledgeable Parties Reach Speedy Conclusion

Continued from page 13

2½-hour presentation by the contractors. The government then had three hours to present its case and to respond to the contractors' position. The contractors had a half-hour rebuttal. The oral presentation was made only by lawyers for each side.

Only the principal negotiators could ask questions, although technical and other advisors were present and available for consultation. A further rule of the oral presentation was that no new matter—not previously discussed in the briefs or written questions—could be presented. Viewgraphs were used by both sides during the presentation. The parties had agreed in advance that copies of these viewgraphs would be provided to the other side upon completion of the minihearing.

- Settlement negotiations then began. An important ground rule was that the matter was to be negotiated for a single day immediately following the minitrial. As it turned out, enough progress was made by the parties to justify an additional day for negotiations. Those further negotiations ultimately resulted in a settlement.

The settlement negotiations were attended only by the principal negotiators. Advisors and legal counsel were standing by, but did not directly participate in the negotiations. Periodically, the principals would break off from the negotiations to discuss possible positions or proposals with their staffs and to respond to presentations made by the other side. As the negotiations *actually* developed, the negotiators were able to go beyond the specific issues framed by the appeals and settle other outstanding questions between the parties as a part of the overall settlement. All claims and related issues which were settled amounted to well over $100 million.

The negotiated procedures for the minitrial provided a mechanism for successful resolution, but there were certain characteristics of this minitrial which seemed to have contributed most to its success.

Prior Discovery

The litigation background provided a context which allowed greater understanding by the parties both of the complexity of bringing the matter to trial and of additional facts previously not considered in the initial evaluations of the case. Discovery had proceeded for a year and a half prior to the minitrial. Important documents and deposition transcripts were thus available to the parties.

This discovery allowed the parties to narrow areas of disagreement during the course of preparation for the minitrial. Strengths and weaknesses for both sides were delineated more precisely. A more realistic evaluation of the chances of success was thus made possible by the substantial discovery that had occurred.

The depositions of several key technical individuals were important to this process. Their testimony clarified what the parties intended in writing the specifications and what was understood at the time the contractors' bid was submitted. This suggests that parties, with an eye to the possibilities of a minitrial type of proceeding, should carefully prioritize the individuals to be deposed during the course of litigation. Because the minitrial may take place before the discovery process is complete, the parties should depose those individuals first whose testimony can have the most substantial impact. An early settlement—with the attendant reduction in litigation costs—may be promoted by this litigation strategy. The sequencing of witnesses could well be different if the parties do not intend to use a minitrial procedure.

No Neutral Advisor

A second important characteristic of this minitrial was the decision not to use a neutral party in the proceedings. Other proponents of minitrials have stated that use of a neutral advisor is essential. This proved, at least in this context, not to be true. Here a neutral advisor might have impeded a settlement rather than having contributed to it.

A salient characteristic of this settlement was the involvement of people having detailed knowledge of the extraordinarily complex and technical issues. An outsider, without this background, would have to have been painstakingly educated on the technical aspects of the case.[4] For example, because of the knowledgeable participants, it was not necessary to spend time explaining the principles of orbit mechanics.

Moreover, both sides had consistently found during the course of litigation that brief explanations of the technical issues to those not familiar with TDRSS often created misimpressions. Brevity, however, is a major attribute of a minitrial. The technical familiarity of the negotiators permitted meaningful dialogue during the oral presentations. Because the disputes involved contract interpretations and the application of those interpretations to technical problems which had arisen, this technical understanding was important to the successful resolution of these disputes. The parties, by deciding not to use a neutral advisor, were able to shorten the presentations substantially and avoid the risk of misunderstanding.

It is axiomatic that no settlement can be reached without participation of those authorized to settle. Thus, the involvement of high-level management and negotiators was crucial to success.

The rule of thumb employed in selecting individuals for the negotiations was to obtain participation from the highest level which would be involved in the review and approval of any settlement. The ultimate decisionmakers, having heard and participated in the minitrial, were also the individuals best armed with the facts.[5]

In the TDRSS case, the negotiators were of such a high level that they had authority to deal with both the issues in the immediate disputes and other issues relating to the contract. This ability to reach beyond the issues directly at hand gave additional negotiating room to the parties to achieve a satisfactory solution, and enhanced the possibility of settlement.

Most important, the commitment of high-level management—and the investment of their time and energy in the minitrial process—helped create a momentum for settlement.

Momentum

No dispute will be settled unless the parties want to settle. With this in mind, one may wonder why a minitrial is needed at all. The answer is that, while most disputants have an undefined desire to settle, th[illegible] frequently reticent about being [illegible] first to express it. Furthermore, their undefined instinct remains vague and nonproductive in the absence of events or procedures which focus their attention and energy on resolving the dispute. The primary purpose of a minitrial is to set the stage and create a momentum for settlement.

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ANALYSIS AND PERSPECTIVE

Attorneys Involved Determined Minitrial Procedure

Continued from page 17

In the case of the TDRSS dispute, the fact that high-level management agreed to participate in a minitrial was perhaps the pivotal element in setting the stage. However, there were other features which enhanced the chances of agreement.

An important characteristic was the establishment of a rigid time schedule for all of the events pertaining to the proceeding. Time limits were necessary so that each side would select its most important points to argue. Presentations, without limits, could have gone on for weeks. Indeed, both sides anticipated that the full hearing on these disputes would take over a month to present.

More important, the parties agreed, if negotiations could not be completed within the scheduled time, that no further discussions would take place and the parties would proceed to trial. The parties recognized that the minitrial represented their last, best opportunity to settle the case without incurring the costs of proceeding to an evidentiary hearing.[6] The parties thereby agreed to pressure themselves to settle.

The formalities of the minitrial also created momentum for settlement. The extensive briefs exchanged by the parties, each approximately 75 pages in length, with citations to discovered documents and deposition testimony, permitted the negotiators to have at one place a legal and factual discussion of the issues and the underlying source data.[7] The briefs and oral presentations gave the parties the sense that there was an adjudication of their positions.

NASA's effective use of the minitrial to resolve the complex, potentially protracted TDRSS dispute raises the question whether this case will be an isolated instance—or whether the government and its contractors should pursue alternative dispute resolution methods more frequently. While there are ostensible impediments, a minitrial approach to settlement may be of particular usefulness in the government contracts setting. Government contract disputes, although in many ways similar to commercial litigation, have unique features. The most relevant of these are the disputes-resolving procedures prescribed by statute—for contracts awarded after March 1, 1979, the Contract Disputes Act of 1978.[8] This statute mandates that all government contracts have a disputes clause which sets forth the procedure by which disagreements relating to the contract are to be resolved.

These standard, mandatory procedures require the government to make a final written decision concerning disagreements with the contractors. This final decision sets forth the government's view of the facts and the legal conclusions which led the government to deny the contractor's claim for additional compensation or other contractual relief. The contractor, upon receipt of the final decision, can acquiesce, or elect either to appeal the decision to an agency board of contract appeals or to sue in the U.S. Claims Court.

These boards of contract appeals have adopted usual litigation procedures. For example, federal court pleading practice is adhered to and the Federal Rules of Evidence are employed. Both sides have full opportunities for discovery in substantial accordance with the Federal Rules of Civil Procedure. The hearing itself is conducted much as nonjury litigation in a federal court and a decision is written based on the record derived from the trial. Appeals from the agency boards can be taken to what will soon be the U.S. Court of Appeals for the Federal Circuit.[9]

Exclusive Procedures?

An impediment to the minitrial approach is raised by the question whether these statutory procedures are exclusive. One board of contract appeals has held that the government cannot submit to binding arbitration because of the conflict with these statutory procedures.[10] But the government's authority to settle—and thus to devise means to settle—has never been doubted. Indeed, many of the provisions of the Contract Disputes Act were designed to encourage the government to settle more contract disputes sooner. A basic purpose of the act was to promote more efficient resolution of disputes.[11]

Continued Performance

One aspect of the statutory disputes procedure makes efficient disputes resolution particularly important: The disputes clause requires the contractor to continue performance notwithstanding the dispute. Thus, in the TDRSS dispute, NASA had the right, pursuant to the changes clause (also a mandatory clause in all government contracts) to insist upon changes to the contract during the course of performance. What would amount to breaches of contract in a commercial context are considered allowable contract changes to a government contract. In exchange for this flexibility to change the contract and require continued performance, the government promises the contractor to pay a fair amount for the additional work.

Not all directions from the government, however, will necessarily be recognized by the government as being changes. Instead, the government may—as in TDRSS—insist that the increased work is already required by the contract. The contractor—pursuant to both the disputes and changes clauses—does not have the option of simply stopping work and testing the legitimacy of the government's position through litigation. Rather, the government contract requires that the contractor continue to perform, leaving for later the question of who will bear the costs.

Efficient disputes resolution therefore is an important and very necessary feature of the government's contracting process.[12] Unlike most commercial

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Management Participates Fully in Dispute Resolution

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disputes, the parties to a government contract maintain an ongoing contractual relationship and performance proceeds on the basis of one party's view of the dispute.

Obstacles to Settling

The government, for a variety of reasons, has historically encountered significant obstacles in settling its contract litigation. These obstacles may also be seen as impediments to the use of minitrial procedures to bring about settlements. However, the minitrial may be particularly well suited to overcoming these very obstacles.

The most serious obstacle to the government's settlement of cases is the need for a consensus on the desirability of the settlement. Even though it is hornbook law that the government's contracting officer possesses almost plenary power to resolve contractual matters, the internal procedures within procuring agencies and the controls on the commitment of appropriated funds require that a number of individuals within an agency approve a settlement. Often approvals must be obtained from the legal, financial, procurement policy, and technical components of an agency. Tentative settlements[4] reached between parties resolving litigation have been upset when those settlements have then been subjected to internal agency review. The inability to come to a decision without the subsequent approval by all, drags out the settlement procedure and allows uninformed and prejudicial second-guessing.

The minitrial obviates much of this problem. In preparation for the minitrial, the government defines both the authority of the negotiator and the acceptable negotiating positions. The requirement that approval be established in advance—coupled with the written authorization from the head of the agency empowering the representative on behalf of the agency to reach a settlement—reduces the opportunities for overturning the settlement.[5] The minitrial forces the parties to develop consistent positions as part of their preparation.

A related problem for the government is its funding requirements. A contracting officer cannot ultimately settle a case without having available funds to cover the settlement. These funding problems are in some ways obviated by the minitrial process. The agencies generally can re-allot monies within the agency in order to cover the financial needs for a particular settlement. These re-allotments require senior agency approval. The minitrial's involvement of these senior officials helps insure the approval.

A third problem facing government agencies seeking to settle litigation is the plethora of organizations outside the agency which also review and possibly second-guess any settlements. The oversight committees of Congress, the audit teams from the General Accounting Office, and the agency inspectors general all are potential reviewers and possible critics. The agency, seeking to avoid controversy, must settle therefore with a view toward outside criticism. The minitrial may ease this problem. It creates a written record clearly documenting the bona fides of the settlement. The briefs set forth the legal positions so that the potential litigation risks are clearly disclosed. The process also offers a formal procedure which itself may lessen criticism.

The key attribute of the minitrial is that it facilitates settlements.[11] The presence of top management on both sides, coupled with set dates for the exchange of briefs and other minitrial events, galvanizes the parties to be fully prepared and creates a momentum which pushes the process forward toward settlement. The resolution of the dispute should, of course, be the primary objective of all involved in the process. And with the resolution come a number of additional benefits. First, to resolve a dispute without full litigation (including a hearing on the merits) results in savings to the parties. These savings include litigation costs and a reduction in disruption of the program manager and other employees who are diverted by the litigation process. Second, a settlement offers the possibility—not available to a judge deciding a dispute—to reach beyond the matter at issue in creatively fashioning remedies. Third, a settlement lessens the adversarial roles between the government and its supplier—a phenomenon that serves the ongoing business relationship of the parties to government contracts.

Another important benefit is that the significant participation of management in that process and the degree of negotiation which transpires as a result of the minitrial often results in a much better understanding of the contract. This greater knowledge and its establishment of baseline agreements greatly facilitates future satisfactory performance under the contract.

A general discussion of "minitrials" is found in Olson, Dispute Resolution: An Alternative for Large Case Resolution, ABA J. Sec. Litigation, Winter 1980, at 22.

[2] The contract was actually awarded to Western Union Space Communications, Inc., but then was transferred to Spacecom—a joint venture of Western Union and several other companies.

[3] These appeals were denominated NASA BCA Nos. 379-4 and 379-12.

[4] An incident in the litigation before the NASA Board of Contract Appeals illustrates this point. Because of the technical complexity and sophistication of the issues, the administrative judges suggested the possibility that they might select an independent technical expert to help them resolve the issues. One of the parties responded that, because of the state-of-the-art nature of the issues, the parties had most of the relevant expertise.

[5] The use of top management may have another benefit since the individuals who precipitated the dispute are not called upon to judge the case.

[6] Schedule rigidity was also necessary to avoid delay in the return to litigation if a settlement was not achieved.

[7] The exchange of briefs had a contingent benefit because, had the settlement talks again failed, it would have advanced the litigation itself. The briefing crystallized each party's understanding of its own case, as well as providing an insight into the other party's factual and legal positions, which allowed a narrowing of the issues.

[8] 41 U.S.C. §601-613.

[9] This new court is created by The Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

[10] Dames & Moore, IBCA No. 1308-10-79, 81-2 BCA ¶76,393.

[11] S. Rep. No. 3178, 95th Cong., 2nd Sess. 1 (1978).

[12] *See* S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972).

[13] Another benefit of the minitrial, if the process is properly invoked, is the narrowing of disputed issues between the parties—even if the parties are unable to realize an overall solution. Therefore, the minitrial may substantially reduce the cost of litigation even if it does not actually remove the need for an evidentiary hearing. ■

'City of New York' Yields Conflicting Industry Standards

Continued from page 14

probability of catastrophic accidents and broadening the department's consideration of the consequences of such accidents, much as companies involved in licensing matters for which NEPA environmental impact statements (EIS) are required often develop data that the licensing agency can use when it writes the EIS. Legal challenges to the district court's determination that DOT must examine psychological and social consequences of the regulations also might be raised. At a minimum, industry presumably will seek to ensure that the court's ruling is construed narrowly to apply only to local regulations affecting densely populated urban areas.

Similarly, where states and localities consider adopting restrictions on the transportation of radioactive materials, industries may want to provide the appropriate committees and legislative bodies with data opposing such regulation. Participation in the proceedings also could lead to state court litigation on the validity of any regulatory scheme adopted by a state or local governing body.

The City of New York decision leaves unsettled the appropriate scope of regulation of radioactive materials, but it does make clear the importance of factual, technical documentation in a challenge to particular regulations. As the next round of DOT and judicial proceedings commences, all affected parties would be well advised to undertake the preparation of a comprehensive record supporting their positions. In any event, the debate on this important social policy will rage on, and no doubt will be the subject of additional judicial pronouncements in the months to come.

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[1] City of New York v. United States Department of Transportation, 81 Civ. 1778 (S.D.N.Y. decided May 25, 1982). An appeal of this decision is pending, but unless briefing is accelerated, a ruling from the Court of Appeals may take as [illegible]

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Disputes

GOV'T AGENCIES, COURTS USING MINITRIAL PROCEDURES TO RESOLVE CONTRACT DISPUTES

The use of alternative disputes resolution procedures is growing in the government contract field.

The Justice Department and the National Aeronautics and Space Administration, for instance, have used ADR procedures that are similar to the Corps of Engineers' recent "minitrials" (44 FCR 502), to spur settlement of complex government contract disputes.

Moreover, several federal courts are following a similar "summary jury trial" process to encourage settlement of complex cases.

Justice's Pilot Program

The Justice Department has had a pilot program in effect for nearly two years that uses minitrial techniques to resolve disputes between the government and its contractors.

The program, which was developed with the assistance of the Center for Public Resources, a New York-based nonprofit organization, was intended to apply to defense contract disputes. Minitrials under this program were to have been held before the Claims Court and the Armed Services Board of Contract Appeals.

When Justice began the program, the Center drew up guidelines to be used in determining the kind of dispute that would be appropriate for the program. "The perceived strength or weakness of the government's case is not a criterion," CPR noted in an article of January 1984. "Senior officials of the contracting agency, Justice, and the private party—all with decisionaking authority—will hear both sides' 'best case' presentations, and then will attempt to negotiate a settlement." The parties can jointly choose a neutral advisor to aid in the settlement process, the article noted.

The program calls on government attorneys to select a limited number of cases for possible minitrials. One criterion is that the case should be at an early stage of litigation. "Both parties should be more than willing to make expenditures directed toward settlement in an early stage in the litigation, before significant time and money has been spent on discovery," the article said, adding that the cost of a minitrial held after completion of discovery proceedings may not be

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significantly less than the cost of a trial in the Claims Court.

In addition, a case selected for minitrials should not raise significant legal issues. "If the case turns on a legal issue... which either the government or the [private] contract bar sees as needing resolution, [the minitrial] technique is probably not appropriate; a minitrial obviously will not provide the legal precedent sought by one or the other party," the CPR article pointed out.

In addition, CPR observed at the time that the minitrial technique is best suited for cases involving more than $250,000. "A minitrial probably will require at least a full day's time of high-level company executives and government officials; the amount at issue... must be significant enough to justify that expenditure of time, even though a settlement agreement is not guaranteed."

Minitrial Guidelines at DOJ

Once a case is selected as a minitrial candidate, the contractor still must agree to the minitrial process, according to a CPR policy paper prepared for Justice in December 1983. "The minitrial procedure is intended to be flexible so that the government and the contractor can tailor it to the particular case or to either party's special needs.

It is important that both parties understand that the discovery process for a minitrial would be quite different from discovery at the Claims Court, the paper explained. Whereas lower-level officials often are deposed first in traditional litigation, the parties can expect discovery against their key decisionmakers early in the minitrial process.

The minitrial format also requires that the participants have sufficient authority to settle a dispute, provided they actually reach an agreement, CPR emphasized. The contractor's representative should be a management official above the rank of contract negotiator or contract administrator. The government agency's representative similarly should be ranked above the contracting officer—a deputy program manager, for instance. Justice should be represented by a Deputy Assistant Attorney General from the Civil Division, because any settlement would require DOJ concurrence.

Justice agreed to select a sample of cases, and to contact the contractors' attorneys to propose use of the minitrial techniques. CPR warned the agency, however, that contractors might fear that cases were being selected for an improper purpose. "It will be important to explain to contractors' counsel that the cases selected were not chosen because of a belief that either side's case is especially strong or for any other reason going to the merits of the dispute."

But Minitrial Procedures Not Used Frequently

However, Justice has used its minitrial pilot program sparingly. In fact, only one dispute—which involved a non-defense contract with the W.M. Schlosser Co.—has been settled with the aid of minitrial techniques, Justice spokesman David Cohen told FCR last week. "But we're exploring using it in several pending cases," he added.

Cohen, who is chief of the Civil Division's Commercial Litigation Branch, said that Justice has never considered the pilot program to be limited to defense contract disputes. "We will consider [using] it in all types of government contracts," Cohen said. He added that Justice had asked several contractors to agree to use of minitrial techniques to settle certain contract disputes, but that the contractors had declined the offer.

The *Schlosser* minitrial was used solely for purposes of determining quantum, Cohen told FCR. Attorneys for the contractor and the government each presented a summary of their views. Representatives from the company and the contracting agency, along with a deputy assistant attorney general, listened to these arguments, and then began settlement negotiations, he said. "They decided how much each was willing to give, and reached a settlement."

Cohen acknowledged that one contractor had asked DOJ about the availability of minitrial procedures, but was turned down on grounds that DOJ did not believe the government was liable in that case. "There was no point in trying to settle; there has to be a litigation risk... before the [minitrial] procedure is appropriate," he pointed out.

NASA Settles Major Satellite Dispute

NASA has used the minitrial procedure to settle a multimillion-dollar dispute involving one of its communications satellite programs. The agency in 1976 awarded a major satellite contract to Western Union Co. for the production of tracking data relay satellites. These communications satellites were to be deployed in orbit by a Space Shuttle, and would serve the function once performed by ground stations. Western Union selected TRW, Inc. to be major subcontractor on the project.

NASA subsequently issued instructions to the contractor, seeking to obtain certain capabilities that it believed were within the scope of the contract. Western Union and TRW maintained that the instructions constituted a change order, prompting one of the largest appeals ever filed at the NASA Board of Contract Appeals.

After several years of delay and expensive discovery proceedings, the parties in 1982 agreed to try to seek a settlement through use of minitrial techniques, TRW Vice President T. Richard Brown told FCR. Western Union had, by that time, sold its stake in the project to Spacecom, a joint venture of Fairchild Industries, Inc. and Continental Telephone, Inc.

NASA was represented at the one-day minitrial by an associate administrator and by the director of the Goddard Space Flight Center. Spacecom and TRW were represented by senior executives. There was no neutral advisor (44 FCR 502) present; the parties had decided that one was not necessary, citing the highly complex technical issues of the case. The representatives listened as attorneys for NASA and the contractors presented oral argument on the technical issues. A question and answer session followed, after which the representatives entered into settlement negotiations. The negotiations resumed several days later, leading to a settlement that was highly satisfactory to both sides, Brown observed.

According to Brown, the idea for the minitrial came in part from TRW, which has used the process to settle commercial disputes. In the late 1970s, TRW had settled a series of patent infringement and breach of contract suits involving its commercial electronics

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business, through use of minitrial techniques (43 FCR 257), he noted. The NASA case was the first time the minitrial concept was applied in the context of government procurement, he said.

The minitrial concept is also advantageous in cases involving classified defense contracts, where public disclosure would be harmful to the national interest, Brown told FCR. The dispute is settled informally, without the need for evidentiary hearing in open court, he explained.

"The advantage of the minitrial over litigation before the NASA Board of Contract Appeals was more than the time and money saved, which was probably more than $1 million in legal fees alone," according to Boston University Law School professor Eric D. Green.

"More importantly, this case involved extraordinarily complex technical problems which both sides would eventually have had to explain to a trial judge," Greeen said, in "The CPR Legal Program Minitrial Handbook," published by Matthew Bender, Inc. in 1982. "By involving top management... and their staffs in a distilled, focused process, a workable and mutually beneficial solution was worked out that was superior to what litigation probably would have produced."

Florida District Court's Summary Jury Trial

Some federal courts, including district courts in Florida and Illinois, have used a similar "summary jury trial" procedure to encourage litigants to settle complex technical cases. "These cases involve issues, like that of the 'reasonable man' in negligence litigation, where no amount of clarification of the laws can aid in resolution of the case," according to a handbook prepared by the U.S. District Court for the Southern District of Florida.

"In these cases, settlement negotiations must often involve an analysis of similar jury trials within the experience of counsel and the trial judge as to the findings of liability and damage," according to the court's handbook.

"In this type of case, counsel is given a chance to sound a lay jury on its perception of liability and damages without affecting the parties rights to a full trial on the merits, and without a large investment of time and money," the handbook says. "The summary jury trial provides a 'no-risk' method by which counsel may obtain the perception of six jurors of the merits of their case... so as to give [them] a reliable basis upon which to build a just and acceptable settlement."

The "summary jury trial," as practiced in the Southern District of Florida, begins with the empanelling of six jurors. The attorneys for plaintiff and defendant then are generally given half a day to set forth their respective cases; no witnesses are permitted to testify. The attorneys may, however, refer to depositions, interogatories, and other discovery materials to indicate what witnesses would say during testimony. The judge will subsequently give the jury abbreviated instructions as to the law, after which the panel renders a decision.

These jury proceedings are *nonbinding*, the handbook stresses. "Evidentiary and procedural rules are few and flexible, and tactical maneuvering is kept at a minimum." The jury is encouraged to return a consensus verdict, but is not obligated to do so.

One government contract case that is a likely subject for the summary jury trial is Solitron Devices, Inc. v. Honeywell, Inc., DC SFla No. 84-8382. The case involves a dispute between a government prime contractor and its sub. According to Solitron's attorneys, Honeywell failed to pay the sub its share of a settlement arising out of defective government specifications. The money was withheld to offset amounts that Honeywell claims are due for breach of subcontract terms.

U.S. District Judge Jose Gonzalez had scheduled oral arguments on the parties' motions for summary judgment for Sept. 26. However, the argument was postponed late last week, and will likely be rescheduled in November. If the judge finds that questions of fact exist, he has said that he will set this case for summary jury trial.

The "summary jury trial" procedure is permitted by Rule 16 of the Federal Rules of Civil Procedure, which gives the federal courts wide discretion in utilizing pretrial methods for processing cases, the handbook emphasizes.

The procedure has been used in other districts besides Southern Florida. Earlier this year, a summary jury trial was used in the Northern District of Illinois to settle a complex antitrust case. In Olympia Equipment Leasing Co. v. Western Union, DC NIll. No. 77C4556, the six-member jury concluded that the plaintiff was due $27 million, according to the handbook. Western Union insisted on a traditional trial, however. After a six-week trial, the traditional 12-member jury returned a $24 million verdict against Western Union, which was then tripled pursuant to the Sherman Antitrust Act.

Moreover, the procedure appears to be used even more frequently at the U.S. District Court for the Western District of Oklahoma, the handbook points out. That court has reported that of five summary jury trials which have proceeded to conventional trials, the verdict in four of them approximated the summary jury verdict.

"The lesson from *Olympia* and other cases that were first tried before the summary jury... is clear; if the parties proceed in good faith to present their case to the summary jury, they can expect to receive a true verdict which, if heeded, will save valuable time and considerable expense."

CPR Advocates Minitrial Concept

Government and industry representatives are interested in the use of these minitrial techniques, according to Washington attorney Eldon H. Crowell. Crowell chairs a CPR committee that focuses on the use of alternative disputes resolution procedures in government contract cases. The industry/private bar members of his panel include:

- Douglas Beighle, vice president and general counsel, Boeing Co., Seattle
- John E. Cavanagh, attorney, McKenna, Conner & Cuneo, Los Angeles.
- Martin Coyle, vice president & general counsel, TRW, Inc., Cleveland.
- James Dobkin, attorney, Arnold & Porter, Washington.
- Jay F. Lapin, attorney, Wilmer, Cutler & Pickering, Washington.

- Douglas Parker, attorney, Mudge, Rose, Guthrie & Alexander, New York.

The government is currently represented on the panel by DOD General Counsel Chapman Cox and Acting Assistant Attorney General Richard Willard. Deputy Assistant Attorney General Carolyn Kuhl has also worked extensively with the group, according to CPR sources.

The minitrial procedure will not be successful unless the parties have a desire to settle their dispute and are willing to negotiate, Crowell told FCR. Also, the parties must be represented by people with authority to settle, he added, adding that a neutral advisor, such as was used in the Corps' minitrials (44 FCR 502; 43 FCR 257), is not necessary. The parties can make up their own rules for the conduct of the minitrial; they can decide what limits to place on discovery, whether to allow witnesses' testimony, and set a timetable for negotiations, he pointed out.

The Department of Energy and the General Services Administration are aware of the Corps' experience with the minitrial, and Crowell's committee is seeking to convince other agencies to look into the concept. The panel has invited the general counsels of the major procurement agencies to attend the group's next meeting, which will be held Oct. 16 at the offices of Crowell & Moring in Washington, D.C.

Both of the Corps' minitrials and the NASA satellite minitrial were held after cases had been filed at the boards of contract appeals, Crowell observed. But filing first at the board isn't necessary to have a successful minitrial, he emphasized.

CPR also has prepared a model minitrial agreement for resolving business disputes. Further details are available from the Center for Public Resources, 680 Fifth Avenue, New York, NY 10019. Tel. (212) 541-9830.

EPA Enforcement Programs

Meanwhile, the Environmental Protection Agency is considering use of alternative disputes resolution techniques to aid in the agency's enforcement efforts, EPA spokesman Richard Robinson told FCR last week. The Center for Public Resources is providing assistance to EPA in this area, he noted, adding that CPR Senior Vice President Peter Kaskell had recently briefed EPA Deputy Administrator James Barnes on the subject.

Robinson, who is director of EPA's Legal Enforcement Policy Division, said the agency EPA is planning to send a memo to all its regional offices and program offices, requesting assistance in implementing a "minitrial" alternative disputes resolution program. These offices will be asked to select test cases, he said. "We want to try it, write the guidance, and train [other] people [at EPA] how to implement it."

Robinson said that he expected the test cases to come from EPA's major program areas, including clean air enforcement, clean water enforcement, and the superfund program. In an Aug. 8 letter to Kaskell, he listed some of the criteria for selecting enforcement cases for resolution via minitrial techniques:

[Text]

- A large number of defendants, thus rendering case management unwieldy.
- Different plaintiffs with different agendas.
- Failure of defendants to establish an efficiently operating steering committee, or to otherwise reach agreement among themselves on settlement issues.
- Personality conflicts between opposing negotiators.
- Inflexible negotiating postures resulting from each party's overestimation of the strength of its case.
- Sophisticated technical circumstances leadiung to a myriad of disputes over issues of fact.
- And controversial issues of law and fact.

[End Text].

Construction grant disputes would not be affected by this alternative disputes resolution program, Robinson said. These are not enforcement cases, and are resolved through other procedures (44 FCR 248), he noted.

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DROP IN MINITRIALS ANALYZED AT ABA MEETING

Construction Disputes: The ENGBCA's Perspective

Contract disputes take too long to resolve, and alternative disputes resolution procedures are part of the solution, Corps of Engineers Board of Contract Appeals Chairman Richard Solibakke told the conferees at a panel session on construction disputes.

There are too many disputes and too few people to resolve them, the ENGBCA chairman observed. A growing lack of trust between the government and contractors also contributes to the delays. And contracting officers who believe that the contractor's claim is not worth the amount requested more often has auditors and attorneys to back him up. "I can't blame them," he observed. "They've got IGs and auditors looking over their shoulder."

Moreover, the disputes resolution process is moving more slowly because the ratio of cases to administrative judges has increased. The Armed Services Board of Contract Appeals is taking in 2,000 new cases per year, but its disposals are not keeping up with the arrivals (44 FCR 927). "And its getting worse," he declared. "As long as you have auditors and nitpickers looking on, the contracting officers will do nothing and the cases will continue to come to the boards."

In addition, pretrial takes more time, Solibakke maintained. "There's a good deal more discovery than in the 'good 'ol days,' with more lawyer and judge time." Pretrial briefs were unheard of ten years ago; now they're common, he added. The boards of contract appeals should consider more minimal fact-finding, issue shorter decisions, and decide some motions without extensive explanations, he said. The boards could also implement more arbitration-type awards if the parties agree, he pointed out, adding that these procedures cut down on trial time and don't require a written decision.

Board, Corps' Views of ADR Procedures

The boards and the courts do not oppose use of minitrials and other alternative disputes resolution procedures, Solibakke emphasized. "We strongly support them, and will give you the time to utilize them," he declared. "No BCA has a vested interest in hanging on to its cases; you don't have to worry about hurting our feelings."

But, contractors that want a precedent should not use the minitrial for resolving a construction dispute. "To make minitrial and alternative disputes procedures work, you must have the will on both sides to settle, not litigate," he stressed, explaining that the minitrial is a structured negotiation leading to settlement.

Litigation costs are escalating, while delays increase in obtaining decisions, Corps chief trial attorney Frank Carr told the conferees. However, the minitrial is not a panacea for resolving disputes; some cases do have to be tried, he acknowledged.

The Department of Justice recently issued a policy statement on alternative disputes resolution, which included procedures for engaging in minitrials, he pointed out. In addition, the Administrative Conference of the U.S. last month recommended that federal agencies make greater use of minitrials and other alternative disputes resolution procedures (46 FCR 150).

Construction contract disputes which are highly dependent on expert testimony are "very appropriate" for minitrials, Prof. Ralph Nash added. However, it is not a good idea for cases involving unsettled questions of law, especially if precedential value is desired, he conceded.

IG Probe of Minitrial Settlement

Nash, who served as the "neutral advisor" in the landmark "Tenn-Tom" minitrial last year (44 FCR 502), pointed out that a disgruntled regional staffer had since charged the Corps representative in that case with incompetence, prompting an Inspector General investigation. The DOD Inspector General is conducting an investigation into charges that the Corps official was "incompetent" in agreeing to settle in the minitrial.

Tenn-Tom Constructors, a joint venture of Morrison-Knudsen Co. and two other corporations, had received a Corps contract to construct part of the Tennessee-Tombigbee Waterway. The contract required the excavation of some 95 million cubic yards of earth. Because of drainage problems, the joint venture encountered difficulties in getting heavy equipment to the site and in performing the work. The contracting officer subsequently denied the joint venture's $60 million equitable adjustment claim, prompting an appeal to the Corps of Engineers Board of Contract Appeals.

The Corps and Tenn-Tom subsequently agreed to try to resolve the claim through the minitrial procedure, which had been used successfully once before on a much smaller case (43 FCR 257). After three days of presentations, the parties—with Nash's assistance—were able to negotiate a $17.25 million settlement (44 FCR 502).

Carr confirmed that a Corps technical staffer at the regional level had charged the Corps' division engineer with incompetence, maintaining that the case was too complex to be settled after a two-day minitrial. This accusation did precipitate an ongoing IG investigation, he conceded.

"If settling [a dispute] means an IG investigation, [government officials] have a real problem," Nash pointed out. In that kind of situation, the government official can't just settle the case, he has to be able to justify it and defend it from subordinates' criticisms.

Asked whether the Corps intended to pick up the pace of minitrials now that the Justice Dept. and ACUS have embraced the concept, Carr responded that "top management supports it, but there is internal resistance at the operating level."

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INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
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27 OCT 1986

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)

SUBJECT: Public Release of Inspector General, Department of Defense Report of Inquiry on Tennessee-Tom Bigbee Mini-Trial Proceedings

This is in reply to your request of September 12, 1986, to disclose publicly the findings of the Inspector General, Department of Defense, report of inquiry on the Tennessee-Tom Bigbee mini-trial proceedings.

I have no objection to your making public the findings and conclusions of the report. As you are aware, the report is not a blanket approval of the mini-trial procedure but is based on the specifics in the Tennessee-Tom Bigbee situation. I applaud the innovative approach taken by your Department to lessen administrative burdens in resolving contract disputes. In my opinion, our current administrative procedures for settling contract disputes have become overly litigious and time consuming. Given this situation and your current procedures, where each case is scrutinized for mini-trial use on its own merit, I see good things ahead for the mini-trial program. As our report indicates, I am concerned about the current mini-trial documentation procedures and look forward to reviewing the recommentations by the Chief Counsel of the Corps of Engineers for better documenting the Government position in these cases.

Should you have any questions, please contact me or Mr. David Comer, Office of the Director for Special Programs, at 697-6592.

Derek J. Vander Schaaf

Derek J. Vander Schaaf
Deputy Inspector General

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TENNESSEE-TOM BIGBEE CLAIM SETTLEMENT

I. INTRODUCTION

A memorandum of January 31, 1986, from the Deputy Inspector General for Program Planning, Review and Management, requested an inquiry into the settlement of a claim made under a U.S. Army Corps of Engineers contract for the Tennessee-Tom Bigbee waterway project. Specifically, we were requested to determine if the $17 million settlement of that claim was justified. We were also asked to review the experimental claim settlement procedures used in the case. Our inquiry included a review of the documents associated with the settlement and on-site interviews of the personnel involved with the case.

II. BACKGROUND

A. Claim. The Nashville Tennessee District of the U.S. Army Corps of Engineers (Nashville) entered into a contract in March 1979, which resulted in the claim under review. The contract was with a joint venture known as Tennessee-Tom Contractors. The primary work required under the contract was the excavation of about 11 miles of the Tennessee-Tom Bigbee waterway. That task involved the removal and disposal of 95 million cubic yards of earth. The contract was a formally advertised firm-fixed price contract in the amount of $270.6 million.

Prior to soliciting bids for the contract, Nashville performed an extensive testing program to determine the geologic conditions that the successful bidder would encounter. The program included a test excavation of a 1,500-foot wide section in the area where the contract effort would be performed. A report of the conditions encountered during the test excavation and other data acquired in the test program were incorporated as a part of the solicitation package for the contract.

Nashville received formal notice in August 1980 and again in April 1981 that Tennessee-Tom Contractors was experiencing soil conditions different from those they had anticipated based on the test program data in the solicitation. Subsequently, Tennessee-Tom Contractors and Nashville held extensive discussions about the data on which the alleged differing site condition was based. Several claims for equitable adjustment were submitted during that period; the final one in the amount of $42.8 million. Nashville established an in-house task force and brought in outside consultants to further evaluate the merit of the differing site condition allegation. After their extensive evaluation and additional discussion with Tennessee-Tom Contractors, Nashville issued a contracting officer's decision in

August 1984 which denied the Tennessee-Tom Contractors claim in its entirety. The Tennessee-Tom Contractors filed an appeal of that decision with the U.S. Army Corps of Engineers Board of Contract Appeals in October 1984.

B. Settlement Procedures. The U.S. Corps of Engineers in 1984 developed a pilot program designed to expedite settlement of claims pending before the Board of Contract Appeals. The term "mini-trial" was coined to describe the settlement procedures used in the pilot program. The term "mini-trial" is, however, somewhat misleading. Although the "mini-trial" incorporates some characteristics of the judicial process, it is essentially a negotiation.

Under the "mini-trial" procedure, top level management officials of each party voluntarily meet to present their best case and negotiate an expedited resolution to a pending Board of Contract Appeals case. The "mini-trial" is designed to resolve disputes arising from matters of fact rather than matters of law and to take no longer than three or four days. The procedure also provides for a neutral advisor who can assist the negotiators in understanding matters of law and assessing the merits of the claim. No transcript of "mini-trial" proceedings is maintained. Either party may withdraw from the "mini-trial" proceeding at anytime.

Nashville is a subordinate command of the U.S. Army Corps of Engineers, Ohio River Division, Cincinnati, Ohio (Cincinnati). Cincinnati believed the Tennessee-Tom Contractors' claim was a viable candidate for resolution under the "mini-trial" procedure because it only involved matters of fact. An agreement between Cincinnati and Tennessee-Tom Contractors was reached in April 1985 to attempt to resolve the claim under a "mini-trial." The Cincinnati Commander, Brigadier General Peter J. Offringa, was designated as the top level management official representing the U.S. Army Corps of Engineers in the "mini-trial." A contracting officer's warrant was issued to authorize Brigadier General Offringa to negotiate a settlement of the Tennessee-Tom Contractors' claim. Mr. J. K. Lemley, a vice president of one of the joint-venture contractors, was empowered to negotiate on behalf of Tennessee-Tom Contractors. Pursuant to the "mini-trial" agreement, Dr. Ralph C. Nash, Jr., Professor of Law at George Washington University, was designated as "neutral advisor."

C. Settlement. The "mini-trial" for the Tennessee-Tom Contractors differing site condition claim was convened on June 12, 1985. Prior to that date, all interested parties agreed that any final settlement arrived at in the "mini-trial" would be for all outstanding claims, including subcontractor claims. The "mini-trial" proceedings dealt primarily with the following four issues:

1. Soil density
2. Distribution of clay lenses
3. The amount of clay
4. A Government 2(A) test report

The first two issues, soil density and the distribution of clay lenses, were determined to be of minor importance. The remaining two issues, however, dealing with the amount of clay found in the excavation site and the Government 2(A) test report, were determined to be significant. Brigadier General Offringa, as the Government negotiator, felt there was sufficient Government liability in the last two areas to negotiate a settlement in the "mini-trial" proceedings. The negotiated settlement totaled $17.25 million and included $1.25 million in subcontractor claims.

III. FINDINGS AND RECOMMENDATIONS

Based on the interviews we conducted and a review of the available "mini-trial" documentation, we believe the Government had sufficient liability to justify a $17.25 million settlement. The use of the "mini-trial" process, in this situation, appears to have been valid and in the best interest of the Government.

We did, however, find a distinct lack of supporting documentation showing how the $17.25 million settlement amount was reached and the basis on which it was allocated to the contractor. We recommend that the U.S. Army Corps of Engineers review its "mini-trial" procedures with regard to documenting prenegotiation objectives and contract settlements.

IV. CONCLUSIONS

We believe the "mini-trial" procedure, in certain cases, is an efficient and cost-effective means for settling contract disputes. The procedure, however, is relatively new to the military, and we believe its use should be carefully considered on a case-by-case basis. The Tennessee-Tom Bigbee claim appears to have been a valid claim and reasonably settled in the best interest of the Government.

DAEN-CCF 30 March 1987

MEMORANDUM FOR MR. EDELMAN AND MR. ROBERTSON

SUBJECT: Alternative Disputes Resolution Update

ADR's held to date:

Industrial Contractors, Inc. (Atlanta, GA/December 3-5 1984)

The mini-trial resolved a contract claim that was pending before the Armed Services Board of Contract Appeals. The principals resolved an acceleration claim in the amount of $630,570 in less than three days, and the dispute was settled for $380,000. At the mini-trial, the Government was represented by our South Atlantic Division Engineer, BG Forrest T. Gay, III, while the contractor was represented by its president. The neutral advisor was Judge Louis Spector, who has since retired as the Senior Claims Court Judge from the U.S. Claims Court.

Tenn-Tom Constructors, Inc. (Lexington, KY/June 12-14 & June 27-28 1985)

Our second mini-trial involved a dispute at the Engineer Board arising out of the construction of the Tennessee Tombigbee Waterway. The contractor was a joint venture composed of Morrison-Knudsen, Brown & Root, and Martin K. Eby, Incorporated. The $55.6 million (including interest) differing site conditions claim was settled for $17.2 million. A vice president for Morrison-Knudsen acted as principal for the joint venture and the Ohio River Division Engineer, BG Peter Offringa, represented the Government. Professor Ralph Nash of George Washington University School of Law was the neutral advisor. Following a three day mini-trial on June 12-14, 1985 and a follow-up one day mini-trial on June 27, 1985, the principals agreed to settle the claim.

Appeals of Saudi Building Technic General Contracting Co., Ltd./Erectors, Inc. (JV) (December 1986)

In a procedure similar to the mini-trial, the Middle East/Africa Projects Office successfully used ADR to settle $105 million in claims arising out of the construction at the King Khalid Military City, Saudi Arabia. After a week long negotiating session that included presentations by the attorneys and claims consultants to each party and representatives from the Saudi Arabian and Philippine Governments, the parties settled the claims for $7 million. This carefully structured negotiating procedure resulted in the resolution of sixty claims which otherwise would have clogged the Engineer Board docket. At this time, the formal settlement agreement has not been signed because of financial arrangements which have to be completed between the joint venture partners.

W.G. Construction Corp. (Norfolk, VA/January 26-27 1987)

The Norfolk mini-trial concerned the appeals of W.G. Construction Corp. under a contract for the construction of the Administration Building - Visitor's Center, Morris Hill Recreation Area, Gathright, VA. The appeals were pending before the Engineer Board. The amount of the claims were $764,783.12. A settlement of $288,000 was reached on February 10. The interesting aspects of this mini-trial were that the contracting officer at the District was the government's principal and that there was no neutral advisor.

Walter T. Dickerson (Cincinnati, OH/February 18-20, 1987)

This mini-trial concerned nine appeals pending before the Engineer Board arising from a contract for the construction for the Modification & Repair of Tainter Gates at Greenup Locks & Dam, Ohio River. On February 20, the Ohio River Division Engineer, Col. Ernest J. Harrell, successfully concluded settlement of these appeals after a two and one-half day mini-trial. The neutral advisor was Frederick Lees, former Chairman of the NASA Board and the contractor was represented by its vice president. The dollar value of the appeals, which concerned issues such as increased work due to differing site conditions, weather related delays and impact costs, totaled $515,123, plus interest. The amount of the settlement was $155,000, inclusive of interest.

Granite Construction Co. (Mobile, ALA/March 19-20, 1987)

This particular ADR procedure combined elements of the mini-trial with non-binding technical arbitration. In this instance, non-lawyers presented the Government and contractor positions on a delay claim to an "expert" neutral advisor. The neutral advisor also was not an attorney. Within thirty days of the presentation, the neutral advisor will be required to prepare a written recommendation and make an oral presentation concerning the merits of the claim to the contracting officer and the contractor's designated principal. The recommendation will not be binding on the parties and will not be admissible in a subsequent hearing if the parties fail to reach a settlement. The amount of the claim is approximately $3,000,000, plus retained liquidated damages of $35,000 and is pending at the Engineer Board.

FRANK CARR
Chief Trial Attorney

SABRINA SIMON
Trial Attorney

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Disputes

NAVY TO EVALUATE ITS ASBCA CASES FOR POSSIBLE ALTERNATIVE DISPUTES RESOLUTION

The Navy will evaluate more than 700 cases now pending before the Armed Services Board of Contract Appeals for possible alternative disputes resolution, as part of a new program, FCR has learned.

The new program, approved by Navy Secretary John Lehman Dec. 23, provides guidelines for the agency's use of minitrials and other ADR procedures. Under the policy, "each contract dispute now pending" must be reviewed and "ADR techniques be used if reasonable."

The Navy conducted three successful minitrials in allowable cost cases last summer, Navy attorney John Turnquist told FCR. The cases involved disputed amounts in excess of $2 million, and showed again—as the Corps of Engineers had demonstrated previously—that ADR techniques could be used successfully in resolving contract disputes.

Lehman's Memorandum

"The Navy has experienced an explosion in many areas of its litigation over the past five years, including a 100 percent increase in contract disputes before the Armed Services Board of Contract Appeals," Lehman observed in his Dec. 23 memorandum. "We must explore alternative methods of resolving cases in litigation which both efficiently use scarce resources and adequately protect the Navy's interests." Every reasonable step must be taken to resolve disputes prior to litigation, he noted.

Lehman sent all Navy Assistant Secretaries the new procedures to be used in conducting the alternative disputes resolution program. "I believe that techniques such as these bear great promise in contract disputes resolution and should be tested throughout the Navy acquisition community."

The memo directed that the new ADR program be implemented on a test basis by all Navy contracting activities, under guidance from the General Counsel's Office. "Each contract now pending and those filed during this test period will be reviewed and ADR techniques used if reasonable," Lehman said. "At the conclusion of the test, the General Counsel will assess and report on the test results."

ADR Techniques

"It is the policy of the Department of the Navy to utilize ADR in every appropriate case," according to the new procedures. "The approval of the General Counsel... or his designee must be obtained before the Navy agrees to utilize ADR with regard to any particular case."

In selecting cases for possible minitrial or other ADR techniques, the new policy states that the fact that legal issues (such as those involving contract interpretation) are involved should not necessarily eliminate a case from consideration. "Similarly, the amount in dispute is a relevant factor to use, but should not solely control the decision."

> [Text] The best candidates for ADR treatment are those cases in which only facts are in dispute, while the most difficult are those in which disputed law is applied to uncontroverted facts. Two types of cases have generally proven to be poor candidates: those involving disputes controlled by clear legal precedent, making compromise difficult, and those whose resolution will have a significant impact on other pending cases or on the future conduct of the Navy's business. In these cases, the value of an authoritative decision on the merits will usually outweigh the short-term benefits of a speedy resolution by ADR [End Text].

The procedures then explain the features of the minitrial, which has been used successfully by the Corps of Engineers to resolve construction disputes, including one valued at more than $50 million (44 FCR 501; 43 FCR 257). The Administrative Conference of the U.S. has defined the minitrial as a "structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case."

The Navy, though not specifically adopting this definition, notes that each party in a minitrial is to be given a specific amount of time to present its position before the "principals," or senior contracting officials who are authorized to settle the dispute.

The Corps' minitrials have featured use of a "neutral advisor" to preside over the proceeding and facilitate a settlement (44 FCR 501). The Navy acknowledges that parties to a minitrial may choose to have a neutral advisor present, and that the "best source" for them is the roster of ASBCA administrative judges. However, there is no requirement for such an advisor, particularly in the smaller and less complex cases, the Navy says.

In negotiating a minitrial agreement, officials should consider the following additional factors:

- The principals should not have had the responsibility for either preparing the claim or denying it.
- The Navy's principal must have contracting officer's authority.
- Post-hearing discussions should not be used in any subsequent litigation as an admission of liability or as an indication of willingness to agree on any aspects of settlement.
- The Navy's principal must have the right to consult with "non-litigation, in-house counsel" prior to a final agreement on resolution of a dispute.

Summary Procedures

While the Navy's alternative disputes resolution program acknowledges that the minitrial will be the most frequently used ADR technique, it does not exclude other methods. Consequently, a "Summary Binding ASBCA Procedure" may be appropriate for resolving large numbers of contract claims involving similar issues. This procedure, which would allow a number of cases to be resolved together or sequentially in a short timeframe, encompasses the following features:

- The parties agree to submit a joint motion to the ASBCA, allowing the case to proceed under summary procedures.
- The parties would be given a limited time to present their cases before the ASBCA administrative judge.
- The administrative judge would decide the case "from the bench," without the need for a written opinion; the only document would be a binding order stating the ASBCA's decision and the quantum awarded, if any.
- The parties would waive their rights to appeal under the Contract Disputes Act.
- The parties might wish to limit the persons making the presentations before the ASBCA to non-lawyers (the contracting officer and his counterpart in the contractor's organization).

Prospects for ADR Activity

ADR is a disputes resolution tool, but it is not a panacea for dealing with the "litigation explosion," Turnquist told FCR last week. The Navy has to evaluate more than 700 ASBCA cases, and that is a time-consuming project, he observed. Statistics on the number of cases that might be appropriate for ADR techniques probably will not be available until this fall, he added.

The role of the General Counsel's office will be to provide overall guidance, and to assure consistency in implementing the program, Turnquist said. He added that the Navy was not planning to establish an office that would be responsible for conducting minitrials. "We have no basis for concluding that there will be a big volume [of cases]; even in the private sector they are not buried in minitrials."

The Navy and the Corps are the only DOD components with alternative disputes resoltion/minitrial programs, Turnquist observed, adding that he was unaware of any efforts by the Army, Air Force or DLA in this area. However, those agencies have received copies of Lehman's memo and the ADR procedures, he said. In fact, the Corps was virtually alone among government agencies in doing minitrials until Lehman signed the memo, he maintained. "[ADR] is a coming subject; there's a lot more talking going on within the government [about it] because of the burgeoning workloads and shrinking resources."

Navy's 1986 Minitrials

"We validated the Corps' experience" before recommending that the Navy implement an ADR program, Turnquist told FCR Feb. 27. He was referring to three minitrials held last summer. The three cases involved overhead cost disputes between $2 million and $5 million; two were settled, and issues were narrowed for trial in the remaining case, he pointed out, calling the efforts a success. However, the Navy attorney indicated that neither the Navy nor the contractors wished to elaborate on the specifics of these minitrials, saying that it "did not further the program." Minitrials have not been free from controversy: charges that the settlement in the Corps' *Tenn-Tom Constructors* minitrial was too generous to the contractor resulted in an Inspector General's investigation (46 FCR 352).

Agencies are not going to resolve every case through ADR techniques, Turnquist emphasized, "but it is a useful tool."

The Navy ADR procedures appear in the text section.

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Alternatives
to the High Cost of Litigation

Center for Public Resources (CPR) New York, New York Vol. 5 No. 2 February 1987

Federal Reclamation Bureau Soon to Adopt an ADR Plan

The Interior Department's Bureau of Reclamation is now ironing out the details of a mini-trial policy for contract disputes. The policy will likely take effect early in 1987, according to the chief of the bureau's policy branch.

The policy chief, Edward Muller, said that the final mini-trial plan will "pretty much" resemble a draft of the initiative circulated for comment to contractors last fall. That detailed draft describes how to select cases suitable for a mini-trial; to compose a mini-trial agreement; to choose a neutral to preside over the mini-trial; and so forth.

A mini-trial is a non-binding, structured settlement process in which each side, often after a brief discovery period, makes a brief and informal presentation of its case. Following that information exchange, settlement-empowered party principals try to negotiate an accord. Sometimes a neutral will conduct the abbreviated hearing and even assist in negotiations; sometimes no neutral is used.

Mr. Muller believes the mini-trial holds out great promise for the complex contract disputes that arise from the work of the reclamation bureau. "Our contracts are primarily for heavy construction," he said. "We build dams in the West, canals and other major construction works."

Such projects are fertile sources of disputes between private contractors and the federal government, Mr. Muller continued. In an interview with *Alternatives* in mid-December, he said that there are three major types of controversies that arise over the bureau's fixed-priced contracts.

The first is the "differing site" dispute, he said, explaining that in these cases contractors allege that the bureau was wrong about the conditions of a construction site. Next are those disputes in which the bureau changes its mind about the work to be performed—changes that the contractor claims puts it at a disadvantage. And last are the "defect in specs" disagreements, Mr. Muller said; in these cases the contractor alleges that the bureau's instructions for a particular project are impossible to fulfill.

In the December interview, Mr. Muller estimated that the bureau had $100 million in pending claims against it on these and other grounds. How are these cases resolved? The present dispute resolution system, based on the Contracts Dispute Act of 1978, is both slow and potentially expensive for the bureau, he said.

When a contractor thinks he has a grievance against the bureau, he files a claim with the contracting officer, who is the bureau official who signed the contract at issue, Mr. Muller said. That claim is a request for a certain sum, known as an "equitable adjustment."

60 Days

The Contract Disputes Act gives the government 60 days to answer the claim but—especially when the government audits the books of the contractor in a sizable dispute—that period is seldom sufficient to resolve the matter. In reality, the parties usually negotiate during this period, and if the government feels it does not have adequate information on the matter within the mandated 60 days, it will

If this happens, the contractor can do one of two things. He can appeal the rejection to the Interior Department's Board of Contract Appeals (BCA), or he can file a suit in the federal Court of Claims. Most aggrieved contractors opt for the former, Mr. Muller said, explaining that the BCA is "cheaper" for litigants because its proceedings are relatively informal.

But "our board is so backlogged it can take two to three years to have a case heard," Mr. Muller said. This delay, costly to both the private contractor and the government, is particularly onerous to the latter if it loses. "If we lose a case we have to pay interest," said Mr. Muller. And with the current BCA backlog, he observed, "that could be three years' worth of interest."

And so the bureau searched for cheaper and faster alternative methods of dispute resolution. The "primary inspiration" for the proposed mini-trial policy, he said, were documents he received from the CPR Legal Program Government Disputes Committee. That committee is a group of leading lawyers searching for ADR methods suitable for such cases.

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Policy Details

Under the bureau's mini-trial policy draft, contracting officers are invited to select a pending BCA contract case for a mini-trial—or to entertain a request for such from the contractor. The procedure is voluntary and non-binding; if settlement is not reached the parties can proceed to the BCA. Only those cases with potential precedential value or with minor sums at stake—the exact sum was undetermined at this writing—are not suitable for mini-trials, the guidelines suggest.

The policy draft also requires that parties to a mini-trial enter a mini-trial agreement, which will describe the procedures to be used, the role of the neutral, time limitations and other matters. The draft also directs that the neutral be "an impartial third party with significant experience in Government contracting and litigation."

The bureau's settlement-empowered official must be its chief administrative officer or his designee, according to the draft. And the contractor's representative, the draft provides, "shall be a senior management official . . . who preferably has not been previously involved in the preparation of the claim or presentation of the appeal."

The draft also cautions that, because speed is a "major factor" in a mini-trial, "the schedule set forth in the agreement must be strictly followed." The ADR procedure is to be confidential as well, according to the draft, which also features a sample mini-trial agreement and mini-trial time schedule.

While some of these provisions may be revised in the final draft, Mr. Muller said, the fall 1986 draft will "probably not be substantially changed." Some contractors who received the draft submitted comments on them, however, and those comments had not been scrutinized at the time of Mr. Muller's interview.

But the goal of the initiative remains constant. "We want to create a structured process for negotiating solutions to these disputes," Mr. Muller said.

POINTS ON A CONTINUUM: DISPUTE RESOLUTION PROCEDURES AND THE ADMINISTRATIVE PROCESS

Philip J. Harter
June 5, 1986*

This report was prepared for the Administrative Conference of the United States. The views expressed are the author's alone and do not necessarily reflect those of the Conference, its Committees, or staff. Portions of the report were revised prior to publication to reflect subsequent developments in the case law.

APPENDIX II
CASE STUDIES OF ADMINISTRATIVE ARBITRATION

Federal Insecticide, Fungicide and Rodenticide Act.

The Federal Insecticide, Fungicide and Rodenticide Act[380] authorizes the Environmental Protection Agency to use data received from one applicant for a pesticide registration in support of another applicant's request for registration. The Act requires the applicant which benefits from the use of another's data to compensate the original data submitter for its use.[381] FIFRA's 1978 amendments[382] mandate the use of arbitration to resolve disputes between pesticide manufacturers concerning the amount of compensation owed.

EPA's use of previously submitted data in support of subsequent "me-too" or "follow-on" pesticide registration applications was first authorized by statute in 1972[383] in the Federal Environmental Pesticide Control Act,[384] which amended FIFRA to convert it from a licensing and labelling statute into a comprehensive regulatory scheme governing the use, sale and labelling of pesticides.[385] These 1972 amendments created the data use provision which requires an applicant to compensate an original data submitter for the benefit derived from the use of its data.[386] Originally, EPA was to determine the proper amount of compensation due in cases in which the parties could not negotiate a price.[387] However, Congress amended FIFRA in 1978, restructured the data compensation system and

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380. Pub. L. No. 80-104; 61 Stat. 163 (1947), codified as amended 7 U.S.C. § 136 et seq.

381. § 3(c)(1)(D); codified at 7 U.S.C. § 136a(c)(1)(D).

382. Federal Pesticides Act, Pub. L. No. 95-396; 92 Stat. 819 (1978).

383. Federal Environmental Pesticide Control Act, Pub. L. No. 92-516; 86 Stat.977 (1972).

384. See Ruckelshaus v. Monsanto, 104 S.Ct. 2862 (1984).

385. As enacted in 1947, FIFRA was primarily a licensing and labelling statute. Under the Act, each pesticide had to be registered with the Secretary of Agriculture prior to sale. The Act required a manufacturer seeking a pesticide registration to supply the Secretary with information necessary to support the claims made on the label. The Act prohibited the Secretary from disclosing a manufacturer's formula but was silent concerning the Secretary's obligation in regard to health and safety data submitted with an application. The 1972 amendments expanded FIFRA to regulate the use, sale and labelling of pesticides. Congress added an environmental criterion to the requirements for a pesticide registration. Since 1972 the administrator of the Environmental Protection Agency must find that a pesticide will not cause unreasonable adverse affects on the environment before registering a new pesticide.

386. § 3(c)(1)(D); 86 Stat.

387. Id.

prescribed the use of binding arbitration to resolve disputes concerning the amount of compensation one applicant should pay to another for the use of its data.[388]

Congress's reason for establishing binding arbitration for resolution of these disputes is not entirely clear.[389] Although the data compensation provisions were the subject of much debate, the central issues involved what data would be compensable and the duration of any compensation period accorded to original data submissions.[390] The legislative history does not explicitly reveal why Congress instituted binding arbitration. Congress was concerned that the resolution of the controversies that had developed over the existing compensation scheme was consuming too many agency resources. It, and EPA, felt that these decisions did "not require active government involvement, [but rather should] be determined to the fullest extent practicable, within the private sector."[391] The notion of using binding arbitration emerged as a compromise between the data suppliers and the data users.[392]

It operates only if the parties have failed to agree on an amount of compensation or to a procedure for reaching agreement. Thus, the legislation primarily encourages the parties to resolve a dispute over compensation through private agreement and authorizes binding arbitration only as a last resort.[393]

FIFRA grants original data submitters a right to compensation when data is used for the benefit of another applicant within fifteen years of the original data submission.[394] Under the Act, any applicant who will benefit from EPA's use of

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[388] 7 U.S.C. § 136a(c)(1)(D).

[389] U.S. Congress, House Joint Committee on Conference, to accompany S.1678, a bill to amend the Federal Insecticide Fungicide and Rodenticide Act, 95th Congress 2nd Session, H. Report 95-1560, September, 1978; U.S. Congress, House, Committee on Agriculture, Report to accompany H.R. 7073 a bill to extend the Federal Insecticide Fungicide and Rodenticide Act, 95th Congress, 1st Session, H. Report No. 95-343; U.S. Congress, House, Committee on Agriculture, Report to accompany H.R. 8681. 95th Congress 1st Session, H. Report No. 95-663.

[390] U.S. Congress, House, Committee on Agriculture, Report to accompany H.R. 7073, 95th Congress 1st Session, H. Report No. 95-343, p. 3.

[391] Statement of Sen. Leahy, floor manager of S. 1678, 123 Cong. Rec. 25709 (1977). See the description of Congress's concern in Thomas v. Union Carbide Agr. Products Co., 105 S. Ct. 3325, 3329-3330 (1985).

[392] Hearings on Extending and Amending FIFRA before the Subcommittee on Department Investigations, Oversight, and Research of the House Committee on Agriculture, 95th Cong., 1st Sess., 522-523 (1977) (testimony of Robert Alikonis, General Counsel to Pesticide Formulators Assn.).

[393] 7 U.S.C. § 136a(c)(1)(D)(ii).

[394] § 3(c)(1)(D) divides the data EPA may use into three categories, data supplied to EPA before 1969, data supplied after 1969, and data supplied after 1978. The Act permits EPA to use data supplied prior to 1969 in its

(continued...)

data submitted less than fifteen years earlier by another applicant must make an offer to compensate the original data submitter for this use. If after ninety days the new applicant and the original data submitter have not reached agreement on the amount and terms of compensation either party may submit the dispute to arbitration by filing a request with the Federal Mediation and Conciliation Service.[395] Participation of both parties is compelled since an original data submitter who fails to participate forfeits its right to compensation and any new applicant who fails to participate will be denied registration.[396]

For the purpose of complying with FIFRA, the Federal Mediation and Conciliation Service has adopted the roster of commercial arbitrators of the American Arbitration Association as well as AAA's FIFRA arbitration rules.[397] Requests for arbitration are forwarded directly to the AAA which notifies the other party of the request.[398] Unless the parties agree to a different procedure, AAA selects an arbitrator from the AAA roster after each party has reviewed a list of potential arbitrators and rated these individuals by degree of acceptability.[399] Unless the parties specify otherwise, a single arbitrator hears each dispute.[400] Neutrality is the central qualification for serving as an arbitrator.[401] Each person appointed as a neutral arbitrator must disclose to AAA any circumstances which could affect his impartiality including any financial interest, bias or past relationship with any of the parties.[402] AAA determines whether an arbitrator is or is not neutral.[403]

394.(...continued)
consideration of any application for registration without the permission of the original data submitter. This data submitter is not entitled to any compensation for the use of its data. EPA may use data supplied to it after 1969 in its consideration of any other manufacturer's application so long as the benefitting applicant makes an offer to compensate the data submitter for the use of its data. The third category of data is that which is supplied to EPA after September 30, 1978. FIFRA guarantees that the applicant who submits data after September 30, 1978 will have exclusive use of this data for a period of ten years. At the end of this ten year period this data submitter will be entitled to compensation for the use of its data for a period of five years. See, § 3(c)(1)(D)(iii).

FIFRA also provides for the use of binding arbitration to resolve the question of compensation when pesticide registrants agree to share the cost of supplying EPA with any additional data requested and are unable to agree on the amounts of contribution. 7 U.S.C. § 136a(2)(B)(iii).

[395] 7 U.S.C. § 136a(c)(1)(D).

[396] Id.

[397] 29 C.F.R. § 1440.1(b).

[398] 29 C.F.R. § 1440.1(a).

[399] 29 C.F.R. § 1440.1 Appendix Sec. 6.

[400] 29 C.F.R. § 1440.1 Appendix Sec. 9.

[401] 29 C.F.R. § 1440.1 Appendix Sec. 5.

[402] 29 C.F.R. § 1440.1 Appendix Sec. 11.

AAA's determination is appealable to FMCS whose decision is conclusive.[404]

Once the arbitrator is selected, the claimant or person seeking compensation has 60 days in which to file a statement detailing the amount claimed and the reasons to support the claim.[405] The other party then has 60 days to respond.[406] The parties may move for discovery through written interrogatories or requests for production of documents.[407] The arbitrator grants requests designed to produce relevant evidence and allows discovery to a degree, "consistent with the objective of securing a just and inexpensive determination of the dispute without unnecessary delay."[408] The arbitrator is empowered to order depositions upon a showing of good cause.[409] The arbitrator may arrange a prehearing conference in which the parties appear before him to consider the possibility of settling the dispute, narrowing the issues, obtaining stipulations or otherwise expediting the disposition of the proceeding.[410] At the hearing, the claimant presents his case followed by the respondent.[411] The claimant must carry the burden of coming forward with evidence to support his claim.[412] The arbitrator decides each issue based upon a preponderance of the evidence.[413] Any party may request that a stenographic record of the hearing be kept and designated the official transcript of the proceeding.[414] After the hearing, the parties may submit written briefs supporting their position and the arbitrator may at his discretion permit oral argument on these briefs.[415]

The arbitrator must issue a decision after the proceeding has closed.[416] This decision must contain findings of fact and conclusions of law with reasoning covering all issues in dispute in the case. The decision must also contain a determination concerning any compensation due.

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403. Id.

404. Id.

405. 29 C.F.R. § 1440.1 Appendix Sec. 13(a).

406. 29 C.F.R. § 1440.1 Appendix Sec. 13(b).

407. 29 C.F.R. § 1440.1 Appendix Sec. 23.

408. 29 C.F.R. § 1440.1 Appendix Sec. 23(a).

409. 29 C.F.R. § 1440.1 Appendix Sec. 23(b).

410. 29 C.F.R. § 1440.1 Appendix Sec. 24.

411. 29 C.F.R. § 1440.1 Appendix Sec. 26.

412. 29 C.F.R. § 1440.1 Appendix Sec. 28.

413. Id.

414. 29 C.F.R. § 1440.1 Appendix Sec. 29.

415. 29 C.F.R. § 1440.1 Appendix Sec 30.

416. 29 C.F.R. § 1440.1 Appendix Sec. 32.

Parties involved in cases in which the disputed amount is $25,000 or less may opt for resolution of their dispute through an expedited procedure.[417] Under this procedure the claim proceeds to hearing within thirty days without discovery or the submission of briefs. The arbitrator's decision consists of short summary findings of fact and conclusions of law.

FIFRA provides that an arbitrator's decision is final and conclusive.[418] The decision is reviewable in court only in the case of "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator. . . ."[419] This narrow scope of judicial review is typical of the level of judicial review available in commercial arbitration.

The arbitration provision has sparked a host of constitutional challenges that are reviewed above.[420]

Pension Benefit Guaranty Corporation.

The Multiemployer Pension Plan Amendments Act of 1980[421](MPPAA) amended the Employee Retirement Income Security Act of 1974[422] (ERISA), to impose liability upon any employer that withdraws from a multiemployer pension plan.[423] MPPAA requires pension plan sponsors and withdrawing employers to arbitrate disputes over the amount of an employer's withdrawal liability.[424]

As originally enacted, ERISA permitted employers to withdraw from multiemployer plans free of any future liability so long as the plan did not terminate within five years of that employer's withdrawal.[425] The employer's obligation to the plan ceased upon withdrawal. However, the plan itself remained liable to pay the benefits which had been promised to that employer's employees during the period of participation. MPPAA created withdrawal liability to prevent employers from withdrawing and leaving the plan obligated to pay the benefits from a reduced pension fund pool.[426] Upon an employer's withdrawal from a plan, MPPAA requires the plan sponsor to determine the extent of the withdrawal liability.[427] Any dispute that arises concerning any determination made by the plan sponsor is resolved through arbitration.[428]

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[417] 29 C.F.R. § 1440.1 Appendix Sec. 22.

[418] 7 U.S.C. § 136a(c)(1)(D)(ii).

[419] Id.

[420] See discussion in text at notes 114-119; 154-165.

[421] P.L. No. 96-364, 94 Stat. 1217, codified at 29 U.S.C. § 1381 et.seq.

[422] P.L. No. 93-406, codified at 29 U.S.C. § 1001 et. seq.

[423] A multiemployer pension plan is one which is maintained under one or more collective bargaining agreements and covers employees of two or more employers. Employers contribute to the plan fund at rates specified in their agreements. These contributions are paid into a pooled fund which is administered by a board of trustees composed of employer designated and union designated members.

[424] 29 U.S.C. § 1401.

[425] 29 U.S.C. § 1001.

MPPAA's legislative history does not reveal why Congress instituted compulsory arbitration to determine a withdrawing employer's liability to the plan sponsor.[429] The bill which originally passed the House[430] did not contain an arbitration provision. The Senate passed a bill[431] in the form of a substitute to the House bill. This Senate bill contained an arbitration provision. There is no Senate Report. The House amended the provision to affect the level of judicial review, and this was accepted by the Senate. The Conference Report is silent concerning the arbitration provision.[432]

The Act directs the Pension Benefit Guaranty Corporation to promulgate rules governing the conduct of the prescribed arbitration.[433] The PBGC published a proposed rule on July 7, 1983.[434] PBGC received 20 comments and incorporated many of the suggestions in the final rule which was published on August 27, 1985. PBGC resolved conflicting suggestions by determining which views best fulfilled the statutory mandate to establish "fair and equitable procedures."[435] Prior to the rules' becoming effective, employers and plan sponsors arbitrated their disputes under Multiemployer Pension Plan Arbitration Rules jointly sponsored by the International Foundation of Employee Benefit Plans and the American Arbitration Association.[436] The new rules apply to arbitration proceedings initiated, pursuant to Section 42221 of the Act, on or after September 26, 1985.[437]

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[426] U.S. Congress, Committee on Conference, 96th Congress H. Rept. 96-1343.

[427] 29 U.S.C. § 1381-1399.

[428] 29 U.S.C. § 1401.

[429] U.S. Congress, Committee on Conference, 96 Congress H. Rept. 96-1343; House, Committee on Education and Labor, H. Rept. 96-889.

[430] H.R. 3904, May, 1980.

[431] S. 1076 July, 29, 1980.

[432] H. Rept. 96-1343.

[433] 29 U.S.C. § 1401(a)(2).

[434] 48 Fed. Reg. 31241 (July 7, 1983).

[435] 50 Fed. Reg. 34679 (August 27, 1985).

[436] The Multiemployer Pension Plan Rules are sponsored by the International Foundation of Employee Benefit Plans and administered by the American Arbitration Association. The rules became effective on June 1, 1981, and are available from the AAA.

[437] 50 Fed. Reg. 34683 (August 27, 1985).

In lieu of the PBGC's final rules governing arbitration, disputing parties may also use other plan rules procedures if they are consistent with the PBGC rules[438] or if they are approved by the PBGC in accordance with procedures set forth in § 2641.13.[439] The PBGC will approve the alternative procedures if the proposed rules will be substantially fair to all parties involved and if the sponsoring organization is neutral.[440]

Under the Act and the PBGC final rules,[441] either of the parties may initiate arbitration within the 60 day period beginning on the 121st day after the date on which the employer requested reconsideration, or if the plan sponsor responds earlier to the request, within 60 days after the employer receives the notification of reconsideration. The parties may jointly request arbitration for 180 days after the plan sponsor has notified the employer of the contractual liability and demanded payment.[442]

The arbitrator's powers and duties are, with a few exceptions, the same as an arbitrator conducting a proceeding under Title 9 of the U.S. Code.[443] The rules require the arbitrator to follow existing law, as discerned from pertinent authority.[444] The regulation does not, however, tell the arbitrator exactly where settled law is to be found.[445]

The final rules differ from the proposed rules in that they do not paraphrase the statutory presumptions that the arbitrator must make as set forth in Section 4221(a)(3) of the Act. The PBGC agreed with several comments that it was superfluous and omitted the paraphrase from the final rules.[446]

Under MPPAA, a plan sponsor's determinations are presumed correct unless it is shown by a preponderance of evidence that a determination is unreasonable or clearly erroneous.[447] Withdrawing employers criticized this presumption, arguing that plan sponsors have an incentive to find large amounts of liability and thus are not impartial and do not deserve a presumption favoring their determinations. For example, in Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc,[448] Thompson contended that the trustees of the plan sponsor have an interest in establishing a large liability and therefore the presumption favoring their determination constitutes a denial of the employer's right to resolution of disputes before an impartial tribunal.[449] The court rejected this contention, finding that trustees do not have an institutional bias and rather have a fiduciary duty to assess withdrawal liability neutrally and reasonably.[450] The court also noted that MPPAA carefully prescribes the methods for computing liability and allows trustees discretion solely in the selection of the specific method of computation to apply in a particular case. The court held the exercise of this limited discretion insufficient to impugn the impartiality of the trustee's determinations.

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[438] § 2641.1.

[439] 50 Fed. Reg. 34686 (August 27, 1985).

[440] § 2641.13(d).

[441] § 2641.2(a)(1)(2).

[442] 29 U.S.C. 1401 (a)(1).

[443] § 2641.4(a).

[444] § 2641.4(b).

[445] 50 Fed. Reg. 34681.

[446] 50 Fed. Reg. 34681.

[447] 29 U.S.C. § 1401(a)(3)(A).

[448] 749 F. 2d 1396 (9th Cir. 1984).

The PBGC has included discovery provisions in the final regulation based largely upon the views expressed in the comments. Discovery provisions were not part of the proposed regulation. The PBGC believes that fairness will often require that discovery be available to the parties due to the nature of the withdrawal disputes.[451] The arbitrator controls the scope of discovery.[452]

The arbitrator also has discretion as to the admissibility of evidence. The proposed rules had qualified the arbitrator's discretion, however, by requiring conformity to the legal rules of evidence if the rights of the parties would be prejudiced otherwise. The PBGC omitted the qualification from the final rules because it agreed with several comments that such a requirement was unnecessary, would invite appeals based on technicalities, and would put non-lawyer arbitrators at a disadvantage.[453]

Although the arbitrator may call a prehearing conference under the final rules,[454] the PBGC is not authorized to do so as it suggested in the proposed rules. Several comments objected to the proposed authorization because it would too deeply involve PBGC in an essentially non-governmental arbitration.[455]

The arbitration hearing date must be no later than 50 days after the arbitrator accepts his appointment, unless the parties agree to proceed without a hearing as allowed under 2641.4(c).[456] The proposed time limit of 30 days had been criticized by the comments so the provision has been extended in the final rules. If the parties cannot agree on a date within a 15 day period after the arbitrator's acceptance, the arbitrator has 10 additional days to set the date.[457]

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[449] The denial of the right to an impartial tribunal violates the Fifth Amendment right of due process.

[450] 749 F. 2d at 1404-1406.

[451] 50 Fed. Reg. 34631.

[452] § 2641.4(2).

[453] 50 Fed. Reg. 34681.

[454] § 2641.4(b)

[455] 50 Fed. Reg. 34681.

[456] § 2641.5(a).

[457] § 2641.5(a).

The parties may appear in person or by counsel and will be subject to the arbitrator's order if they fail to appear or file documents in a timely manner.[458] A stenographic or taped record of the proceeding will be made upon the request and expense of any party.[459] The arbitrator must establish a procedure to allow each party full and equal opportunity to present his claims and proofs, cross-examine witnesses and file a brief.[460]

The arbitrator may reopen proceedings for good cause at any time after the close of the hearing and before the final award is rendered.[461] Although the proposed rule required the consent of both parties, the PBGC agreed with several comments which objected to giving the parties the power to frustrate the reopening.[462] The final rule, therefore, does not contain the consent requirement.

The arbitrator must make a written award within 30 days of the close of proceedings.[463] The close of proceedings is marked by either the date the hearing was closed, the date the last brief or reply brief was filed, the date the reopened proceedings were closed, or if the parties waived a hearing, the date on which final statements and proofs were filed.[464]

Two comments objected to the time limits on the arbitrator to render an award because they were unreasonably short and ambiguous. The PBGC clarified the ambiguity by explicitly defining what marks the closing of proceedings but did not adopt the time limit suggestions. The PBGC believes that the limits are adequate because it is the duty of the arbitrator to make sure before he accepts the appointment, that he will be able to render awards promptly after the close of proceedings.[465]

The arbitrator's final award must include a factual and legal basis for the his findings, adjustments for amount and schedule of payments, and a provision for an allocation of costs.[466]

The requirement in the final rules that the arbitrator state a factual and legal basis for his award is a slight revision from the proposed requirement that the arbitrator explicitly characterize his statements as "findings of fact" or "conclusions of law." Some comments argued that non-lawyer arbitrators would be burdened by making the proper categorization. The AAA also criticized the need for the arbitrator to make conclusions of law and noted, in fact, that the Federal

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[458] § 2641.5(c).

[459] § 2641.5(d).

[460] § 2641.5(e).

[461] § 2641.6(a).

[462] 50 Fed. Reg. 34682.

[463] § 2641.7(b).

[464] § 2641.7(c), (d), and (f).

[465] 50 Fed. Reg. 34682.

[466] § 2641.7(a)(1), (2), and (3).

Arbitration Act does not require it. The PBGC agreed that the requirement is of little value and, therefore, made clear in the final rules that the arbitrator need only state a factual and legal basis for the award.[467]

After the final award has been rendered, the plan sponsors are required to make copies of the awards available to the PBGC and contributing employers.[468] One comment suggested that the PBGC publish and index awards. Although the PBGC lacks the resources to comply with the suggestion, it does agree that the awards should be made public.[469]

The arbitrator's award is reviewable in a United States district court.[470] The scope of judicial review of the award is not clear under the statute, however. MPPAA § 4221(b) contains two distinct references concerning judicial review of an award.[471] § 4221(b)(2) authorizes any party to bring an action in a district court in accordance with 29 U.S.C. § 1451 to enforce, vacate, or modify an award. 29 U.S.C. § 1451 provides that a party adversely affected by the Act may bring an action in a district court "for appropriate legal or equitable relief or both." This provision for review is modified by § 4221(c), which provides that in any proceeding under § 4221(b) an arbitrator's findings of fact will be presumed correct subject to rebuttal only by a clear preponderance of evidence. Thus § 4221(b)(2), modified by § 4221(c) appears to authorize de novo review of all issues of law and review of factual findings under a clear preponderance of the evidence standard. This has been the conclusion of most courts which have interpreted the MPPAA arbitration provision.[472]

The provision for judicial review described above is confused by § 4221(b)(3). This section provides that to the extent consistent with MPPAA, arbitration proceedings are to be enforced as an arbitration carried out under the United

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467. 50 Fed. Reg. 34682.

468. § 2641.7(g).

469. 50 Fed. Reg. 34682.

470. 29 U.S.C. § 1401(b).

471. Id.

472. See, Board of Trustees of the Western Conference of Teamsters Pension Plan v. Thompson Building Materials, 749 F. 2d 1396, 1400 (9th Cir. 1984) (Court interpreted MPPAA as prescribing de novo judicial review of questions of law, while arbitrator's findings of fact are presumed correct unless rebutted by a clear preponderance of evidence.); see also, Peick v. Pension Benefit Guaranty Corp., 742 F. 2d 1247 (7th Cir. 1983) (Court rejected contention that MPPAA denies employers their right to access to courts stating that, "Arbitration is ... merely the first step in resolving conflicts arising under the Act." 742 F. 2d at 1277. The court viewed MPPAA as providing a means for encouraging parties to settle dispute and not as a means for reaching a final determination.); see also I.A.M. National Pension Fund Benefit Plan C v. Stockton TRI Industries, 727 F. 2d 1204(D.C. Cir. 1984) (Court analogized MPPAA arbitration to administrative agency action and determined the scope of review to be equal to that accorded to administrative adjudications).

States Arbitration Act.[473] The Arbitration Act provides very limited judicial review, applicable only in cases of fraud, partiality and misconduct. To date at least one appellate court has interpreted § 4221(b) as authorizing only the limited scope of judicial review provided in the United States Arbitration Act.[474]

The courts which have interpreted MPPAA's arbitration provisions thus far have been called upon to determine the Act's constitutionality and have not actually reviewed an arbitration decision under the Act. MPPAA has been upheld against assertions that its provisions violate standards of due process;[475] deny employers access to an impartial tribunal;[476] commit a taking of property without just compensation;[477] violate the Seventh Amendments provision for trial by jury;[478] and constitute a violation of Article III of the Constitution by vesting federal judicial power in arbitrators who are not federal Article III judges.[479]

Commodity Futures Trading Commission Reparations Procedures

The Commodity Exchange Act of 1974[480] established a reparations procedure by which individuals alleging injury under the act as a result of a violation caused by a registered commodities trading professional could adjudicate their claim within the Commodities Futures Trading Commission. The Act offers this reparations procedure as an alternative to civil litigation or resort to a privately sponsored dispute resolution mechanism.

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473. The Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502 (D.C. Cir. 1984).

474. 9 U.S.C. § 1 et seq.

475. See, Pension Benefit Guaranty Corp v. R.A. Gray, 104 S.Ct. 2709(1984)(Court held constitutional MPPAA's retroactive imposition of withdrawal liability).

476. See discussion in text, Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc, 749 F. 2d 1396 (9th Cir. 1984); Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502(D.C. Cir. 1984); Peick v. Pension Benefit Guaranty Corp. 724 F. 2d 1247 (7th Cir. 1983).

477. Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc, 749 F. 2d 1396, 1406 (9th Cir. 1984) (Taking clause does not prohibit Congress from readjusting contractual relationships of private parties); accord, Peick v. Pension Benefit Guaranty Corp., 724 F. 2d 1247, 1274-1276 (7th Cir. 1983).

478. Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502, 1511 (D.C. Cir. 1984); Peick v. Pension Benefit Guaranty Corp., 724 F. 2d 1247, 1277 (7th Cir. 1983).

479. Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, 749 F. 2d 1396, 1404-1406 (9th Cir. 1984).

480. Pub. L. 93-463.

The reparations procedure has processed approximately 1,000 claims each year since its inception in 1976.[481] From the outset, however, CEA's reparations procedures frequently resulted in long delays and backlogs.[482] Because the procedure was not providing for expeditious, inexpensive resolution of claims as intended, Congress amended the reparations provision in 1982 to grant CFTC the power to promulgate rules, regulations, and orders necessary to provide for the efficient and expeditious administration of reparations claims.[483] Under this authority, CFTC issued reparations rules, completely revising the reparations procedures originally established by CEA.[484] CFTC's current rules create a three track decisionmaking procedure including a voluntary decisional procedure analogous to commercial arbitration, a summary decisional procedure for claims of up to $10,000 and a formal decisional procedure for claims exceeding $10,000.

A person who believes he has been injured due to a registrant's violation of the Act may apply for reparations by filing a complaint with the proceeding clerk of CFTC's Office of Proceedings.[485] This complaint must contain a description of the relevant facts under which the alleged violation has occurred, a claim for damages, and an election of one of the three decisional procedures. The Office of Proceedings initially reviews the complaint and either serves it upon the named registrant, terminates the complaint, or returns it to the complainant for correction of deficiencies.[486] The Office of Proceedings may terminate a complaint only if it raises claims which are not cognizable in a reparations proceeding.

Upon receipt of a complaint a registrant must file an answer within 45 days.[487] The answer must contain a detailed statement of the facts which constitute the ground for a defense, any counterclaims, and an election of a decisional procedure. The answer also may include a motion for reconsideration of the determination to forward the complaint under which the registrant may request a review of the complaint for any patent defects such as a statute of limitations defense. The complainant is permitted thirty days in which to reply to any counterclaim.[488] The failure to answer a complaint or reply to a counterclaim acts as an admission of the allegations and waives a party's right to a decisional procedure.[489] The Office of Proceedings may designate a proceedings officer to enter findings of fact and conclusions of law, including a reparations award against a non-responding party. A default order so entered will become a final order of the Commission unless set aside within thirty days.[490] Within thirty days, a proceeding officer may set aside a default order upon a party's showing that it has a reasonable likelihood of success on the merits and that no prejudice would result from proceeding to the merits of the claim. Once thirty days have passed and a default order has become a final order of the Commission, the proceeding officer may only set it aside if, in addition to showing reasonable likelihood of success and that no prejudice would result, a party establishes that the order was obtained through fraud, mistake, excusable neglect or that the Commission lacks jurisdiction. In either case, the proceeding officer's decision may be appealed to the Commission.

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[481] Raisler, Nelson, and Wright, CFTC Reparation Rules Offer Novel Adjudication Angle, Legal Times, April 16, 1984.

[482] Id.

[483] Pub. L. 97-444, 96 Stat. 2308, 7 U.S.C § 18(b).

[484] 49 Fed. Reg. 6602-6644.

[485] 17 CFR § 12.13.

[486] 17 CFR § 12.15.

[487] 17 CFR § 12.18.

[488] 17 CFR § 12.20.

[489] 17 CFR § 12.22.

Parties may pursue discovery under each of the three decisional procedures through requests for production of documents, serving depositions on written interrogatories and requests for admissions.[491] Parties may seek all relevant subject matter not subject to a privilege, except that tax returns and personal bank account records are discoverable only upon a showing that such information cannot be obtained by other means. A party served with a discovery request may seek to limit discovery through a motion for a protective order by the Office of Proceedings. In each of the three decisional proceedings discovery must be completed within a period of sixty days after the Office of Proceedings notifies the parties of its commencement.

In the first year following institution of the new rules, from April 23, 1984, to April 30, 1985, CFTC received 441 complaints.[492] The number of complaints increased over the last six months so that CFTC projects that it will receive approximately 500-550 complaints in fiscal year 1985. Of the 441 complaints received under the current rules, 125 have been forwarded for a hearing, 254 remain pending in the Complaints Section of the Office of Proceedings and 62 have been terminated through settlement (28) or due to a complainant's failure to correct deficiencies or because the claim is barred by the statute of limitations or other patent defense.

Among the 125 cases forwarded for hearing, 56 have been pursued through the formal decisional proceeding, 46 through the summary decisional proceeding and in 23 cases the litigants have elected the voluntary proceedings.

As of June, 1985, 6 of the 56 cases following the formal proceedings have been completed. These 6 cases were all resolved through settlement on the average of 119 days after the case was forwarded from the Complaints section. No case under the formal decisional proceedings has yet concluded through judgment.

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[490] 17 CFR § 12.23.

[491] 17 CFR Subpart B §§ 12.30-12.36.

[492] The statistics detailing the Commission's experience under the new reparations rules are taken from a Commodities Futures Trading Commission Staff Document in the form of an Informational Memorandum to the Commission from Executive Director Molly G. Bayley, "Report to the Commission on the Operation of the New Reparations Rules," June 11, 1985. In addition to the cases processed under the new reparations rules, from April 23, 1984 to April 30, 1985, the Commission also processed 320 reparations cases which had been filed prior to April 23, 1985, under the old reparations rules.

Under the summary proceedings, judgments have been reached in 4 cases out of the 46 forwarded to a judgment officer. In addition, one case was settled and another was resolved through a judgment against one party and settlement with the other parties. These case have concluded on an average of 47 days after the cases were forwarded from the Complaints section of the Office of Proceedings to the Hearings section.

Of the 23 cases following the voluntary proceedings, five have been decided by judgment officers. These decisions have been reached an average of 40 days after the cases were forwarded to the judgment officer.

In June, 1985, 254 cases were pending in the Office of Proceedings. Approximately 80 percent of these cases had been in the Office for less than six months and more than 50 percent had been in the Office for less than three months. The length of the time pending before a case is forwarded for a hearing is attributable in part to the time lags in waiting for respondents' answers and to the time spent waiting for complainants' to correct deficiencies in original complaints.

The voluntary decisional proceeding is patterned after commercial arbitration.[493] This procedure is adopted only upon the consent of both the complainant and the registrant. Under this procedure the parties waive any right to an oral hearing and any right they may have had to receive written findings of fact, Commission review or judicial review.[494] Upon the election of the voluntary proceeding, the Office of Proceedings appoints a judgment officer, who is an employee of CFTC to hear the claim.[495] This judgment officer hears all motions concerning discovery and upon close of discovery makes an award on the basis of the written documents submitted.[496] The judgment officer's final decision contains a brief conclusion concerning any alleged violation or counterclaim and an award of damages without any finding of fact.[497] No damage award may exceed the amount requested as damages by a party in its pleading. The judgment officer's decision is final; it may not be appealed to the Commission or to a court although it may be enforced in a United States district court.[498] Despite this finality, the Commission, upon its own motion, may review an award to determine that it is not the result of any fraud, partiality or other misconduct.[499] The judgment officer's conclusion concerning a registrant's violation of the Commodity Exchange Act is not a Commission finding for purposes of denying or revoking a person's registration under the Act; it is considered a final Commission order however for all other purposes and thus may have res judicata effect.

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[493] 49 Fed. Reg. 6611; 17 CFR Subpart C, §§ 12.100-106.

[494] 17 CFR § 12.100(b).

[495] 17 CFR § 12.26(a).

[496] 17 CFR § 12.101.

[497] 17 CFR § 12.106.

[498] 17 CFR § 12.106(d).

[499] 17 CFR § 12.403(b).

The summary decisional procedure is available for resolution of reparation claims of $10,000 or less.[500] In this proceeding, as in the voluntary proceeding, a Commission employee known as a judgment officer serves as decisionmaker.[501] The judgment officer plays a very active role in the summary procedure which primarily resolves disputes based upon written documentation.[502] The judgment officer rules upon discovery related motions, may conduct predecision conferences between the parties and additionally, on occasion may permit oral testimony either in person in Washington, D.C. or through a telephonic hearing.[503] Oral testimony may be received only after a party shows that oral testimony is "necessary or appropriate to resolve factual issues which are central to the proceeding."[504] The judgment officer has discretion to limit the issues upon which oral testimony will be received. At the close of the evidence, the judgment officer must issue an initial decision containing brief findings of fact and determinations of all questions of law including an award of damages.[505] Upon receipt of the judgment officer's initial decision, either party may appeal to the Commission. If no appeal is taken, or is not taken within 30 days and if the Commission does not review the decision upon its own motion, the judgment officer's decision becomes a final decision of the Commission.[506]

On appeal, the Commission reviews briefs filed by the parties and may at its discretion hear oral argument.[507] The Commission is not bound by the findings or determinations made by the judgment officer although it may summarily affirm an initial decision which is substantially correct.[508] The Commission remains free to make any findings or conclusions it deems warranted on the basis of the record developed. The Commission's decision is appealable to the United States Court of Appeals under § 14 of CEA where its findings of fact are conclusive if supported by substantial evidence.[509]

The formal decisional procedure is the most detailed of the reparations proceedings and is available for resolution of claims exceeding $10,000.[510] Under this proceeding an administrative law judge presides over a trial-type hearing and decides all claims, while a proceedings officer handles prehearing motions including ruling upon all discovery motions.[511] A proceeding officer's decisions are appealable to the ALJ assigned to the case.[512] Either the proceeding officer or the ALJ may preside over a prehearing conference for the purpose of narrowing the issues for hearing or encouraging settlement or the use of the voluntary decisional procedure.[513]

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[500] 17 CFR § 12.26(b).

[501] Id.

[502] 49 Fed. Reg. 6613.

[503] 17 CFR § 201.

[504] 17 CFR § 12.209.

[505] 17 CFR § 12.210.

[506] 17 CFR § 12.210(d).

[507] 17 CFR § 12.401.

[508] 17 CFR § 12.406.

[509] 7 U.S.C. § 18.

[510] 17 CFR § 12.26(c).

An administrative law judge presides over the hearing[514] and has the power to dispense with oral testimony concerning any factual issues that can be resolved solely through review of submitted documentary evidence.[515] However, as a rule, administrative law judges are expected to allow the opportunity for full oral hearings.[516] At the hearing, the parties may conduct direct and cross-examination and introduce any documentary evidence which is relevant, material and reliable.[517] All hearing proceedings are recorded and transcribed under the supervision of the ALJ.[518] At the close of the hearing the ALJ may request the parties to file proposed findings of fact and conclusions of law.[519]

At the conclusion of the proceeding, the ALJ issues an initial decision containing findings of fact and conclusions of law.[520] The ALJ's decision becomes a final decision of the Commission unless a party appeals to the Commission within thirty days or the Commission itself moves to hear the case.[521] The Commission's power to review an ALJ's decision is the same as its power to review initial decision's developed in the Summary Decisional Procedure. The Commission receives briefs and at its discretion hears oral argument and ultimately may make any findings or conclusions which it determines are warranted by the record. A decision of the Commission is reviewable in the United States Courts of Appeals under § 14 of the CEA where the Commission's findings of fact are conclusive if supported by substantial evidence.[522]

Superfund Arbitration.

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[511] 17 CFR §§ 12.300-12.304.

[512] 17 CFR § 12.302.

[513] 17 CFR § 12.303-304.

[514] 17 CFR § 12.304, 312.

[515] 17 CFR § 12.311.

[516] 49 Fed. Reg. 6616.

[517] 17 CFR § 12.312(d).

[518] 17 CFR § 12.312(f).

[519] 17 CFR § 12.312(g).

[520] 17 CFR § 12.314.

[521] 17 CFR § 12.314(d).

[522] 7 U.S.C. § 18 (1982).

The Comprehensive Environmental Response, Compensation and Liability Act[523] (CERCLA or Superfund) relies upon arbitration to resolve conflicts arising from the Environmental Protection Agency's Administrator's determinations of claims asserted against CERCLA's Hazardous Substance Response Trust Fund.[524]

The Superfund Act created a Trust Fund to pay for the clean up of hazardous waste spills and disposal sites.[525] The Trust Fund may be used to pay the federal government's costs to clean up hazardous waste sites, the costs incurred by any person responding to actual or threatened hazardous substance releases and the costs incurred by a state or federal agency in restoring, rehabilitating or replacing natural resources harmed as a result of a hazardous substances release.[526] A person who has responded to a hazardous substance release or a state responsible for restoring natural resources harmed by a release may assert claims against the fund whenever they have not recovered from any other potentially liable party. EPA may award claims for response costs incurred by any person so long as the costs were expended in compliance with the National Contingency Plan of the Clean Water Act and were preauthorized by EPA. EPA may pay the costs incurred by a state acting as trustee of natural resources so long as they were expended either in accordance with a plan developed under CERCLA or in response to an emergency.

Upon presentation of a claim, the EPA administrator, must attempt to negotiate a settlement and if unsuccessful, make an award from the fund or deny the claim.[527] The administrator must submit denied claims for arbitration.[528] A claimant may request arbitration of an award the claimant finds unsatisfactory.[529]

Under CERCLA, the President must establish a Board of Arbitrators to hear claims.[530] The members of this Board must be selected in accordance with procedures utilized by the American Arbitration Association. CERCLA authorizes an arbitrator to conduct informal public hearings and issue written decisions.[531] The Act provides for judicial review of arbitrators' decisions in a United States district court. The district court is to uphold an arbitrator's decision unless it finds that decision constitutes an "arbitrary or capricious abuse of the members' discretion."[532]

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[523] Pub. L. 96-510; 94 Stat. 2767 (1980); 42 U.S.C. 9601 et. seq.

[524] The arbitration provision is found in Sec. 112(b)(4).

[525] 42 U.S.C 9631-33.

[526] CERCLA Sec. 111(a).

[527] CERCLA Sec. 112(b)(2)-(3).

[528] CERCLA Sec. 112(b)(3).

[529] Id.

[530] CERCLA Sec. 112(b)(4)(A).

[531] CERCLA Sec. 112(b)(4)(B)-(D).

The Environmental Protection Agency issued a proposed rule to establish procedures for the conduct of arbitration on March 8, 1985,[533] followed by a 60-day comment period. EPA made minor alterations to the rule and published the final rule on December 13, 1985.[534] The rule provides that the EPA Administrator will appoint the members of the Board of Arbitrators.[535] The Administrator will screen applicants for membership to the Board by evaluating such criteria as background in hazardous substances or administrative procedures.[536] In compliance with CERCLA, the Administrator will forward the names and qualifications of those applicants he selected to the American Arbitration Association (AAA).[537] If the applicant meets the requirements of AAA, his name will be returned to the Administrator for possible appointment to the Board.[538] Board members will receive three year appointments and serve at the pleasure of the Administrator. Board members may be removed for any reason the Administrator deems appropriate except that a member may not be dismissed during the pendency of a claim in the absence of a showing of bias, personal or financial interest. The total number of arbitrators or board members will be determined by the Administrator.

A member of the Board may arbitrate a claim in one of two situations: (1) whenever the Administrator denies a claim; or (2) whenever a person dissatisfied with an award requests arbitration. The arbitrator may only make awards which are compensable from the Fund under CERCLA's complex scheme. Thus the arbitrator may not award claims which would reverse EPA decisions concerning the preauthorization of claims under the National Oil and Hazardous Substances Contingency Plan and may not award costs for the harm caused to natural resources unless the costs are distributed under a plan developed under CERCLA or were expended in response to an emergency.[539]

The proposed rule limits the arbitrator's role to fact finding.[540] In deciding a claim, the Board must apply legal standards as prescribed by EPA in the "summary of applicable standards and principles" which EPA must develop for each claim.[541] The rule also directs the Board to accord "substantial deference to EPA decisions as reflected in the administrative record."[542] Additionally, the rule absolutely prohibits the Board from reviewing an Administrator's decision to deny a claim whenever that decision is made "based on competing priorities for the expenditure of Fund monies."[543] Finally, claims by other federal agencies are not eligible for adjudication by the Board.[544]

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[532] CERCLA Sec. 112(b)(4)(G).

[533] 50 Fed. Reg. 9586.

[534] 50 Fed. Reg. 51196.

[535] 40 CFR 305.20(a).

[536] 40 CFR 305.20(b).

[537] 40 CFR 305.20(b).

[538] Id.

[539] See 40 CFR 305.21.

[540] 50 Fed. Reg. 51198.

[541] 40 CFR 305.21(g).

The Administrator must submit all denied claims to the American Arbitration Association within five days.[545] The Administrator must include with this denial an explanation of the decision, a statement of the legal standard applicable to the claim, any other supporting documentation which EPA deems necessary to explain the reason for denial and, if known, the identity of any potentially responsible parties. At this time the Administrator may also request AAA to use expedited procedures to hear any claim involving $20,000 or less.[546]

A claimant dissatisfied with the Administrator's award may initiate arbitration by submitting the claim to AAA within 30 days of the Administrator's decision.[547] The claimant's submission must include an explanation of the matter and amount in dispute, and the remedy sought. The claimant must also include a copy of the Administrator's decision, any supporting documents the claimant deems necessary to support its claim and the identity of any potentially liable parties, if known.[548] Within 5 days of receipt of a claim, AAA must notify the other party of the dispute's existence by sending that party a copy of the claim.[549]

Once the claim has been submitted, AAA will distribute to the parties a list of potential arbitrators drawn from the Board of Arbitrators.[550] After the parties have an opportunity to rate these members in order of preference, AAA will invite the parties to accept one arbitrator from the list to hear the claim. If the parties do not agree upon an arbitrator, AAA may appoint a member to hear a claim. Arbitrators must immediately disclose to AAA any circumstances likely to affect impartiality including any bias or personal or financial interest or past relationship with the parties, their counsel, or any potentially responsible party.[551] AAA will share this information with the parties but retains sole discretion to decide whether an arbitrator should be disqualified due to bias or interest.

The responding party to an arbitration has seven days after receipt of the notice of the claim to file an answer.[552] If arbitration is initiated by a claimant, EPA must file a statement detailing the applicable legal standards and principles governing the dispute. Either party may file an amended pleading after arbitration has been initiated, however, once the arbitrator has been appointed new claims may only be added with the arbitrator's consent.[553] Whenever an amended pleading is filed, the other party has seven days from the date of receipt of such pleading in which to file an answer.

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[542] 40 CFR 305.21(h).

[543] 40 CFR 305.21(f).

[544] 50 F.R. 51199.

[545] 40 CFR 305.30(a).

[546] 40 CFR 305.30(b).

[547] 40 CFR 305.30(a).

[548] 40 CFR 305.30(c).

[549] 40 CFR 305.30(d).

[550] 40 CFR 305.31.

[551] 40 CFR 305.32.

Either the arbitrator or the parties may request a prehearing conference.[554] At such a conference the parties are expected to arrange for the exchange of information, including witness statements, exhibits and documents, and to stipulate to uncontested facts in an effort to expedite the proceeding. Arbitrators may encourage further settlement discussions during the prehearing conference to expedite the arbitration proceedings.[555] The hearing must take place at a site selected by the administrator with due consideration to any requests by the claimants and it must occur no more than 60 days after the arbitrator's appointment.[556] The arbitrator is responsible for making a full record of the hearing proceedings. The hearing consists of direct examination of witnesses, cross-examination and the submission of documentary proof. The parties may offer any evidence they wish, subject to reasonable limits established by the arbitrator. The arbitrator may receive the evidence of witnesses by affidavit, interrogatory, or deposition. If the arbitrator determines that an inspection or investigation is necessary, the arbitrator may request that the Administrator conduct an investigation or inspection under CERCLA § 104(b). The administrator decides whether or not to go forward with such an investigation or inspection.

The arbitration may even proceed in the absence of any party, who after due notice fails to be present, fails to obtain an adjournment, or fails to have evidence presented on his behalf. The party will be deemed to be in default and the arbitrator will require the party who is present to submit such evidence necessary for the arbitration to make an award.[557]

After the parties have completed their presentations the arbitrator may close the hearing, or request the submission of briefs or additional documents.

The arbitrator must make his decision within 90 days of the submission of the claim to the Board.[558] This period may be extended upon consent of all parties or by the Administrator when a large number of claims arising from a single incident or set of incidents have been consolidated for hearing. The arbitrator's decision must be written and contain a full statement of the basis and rationale for the arbitrator's determination.

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552. 40 CFR 305.40.

553. 40 CFR 305.40(b).

554. 40 CFR 305.41.

555. 40 CFR 305.41.

556. 40 CFR 305.42.

557. 40 CFR 305.42(i).

558. 40 CFR 305.43(a).

Expedited procedures are used to resolve claims that do not exceed $20,000, unless the Administrator demands full procedures.[559] In addition, the parties may consent to the use of expedited procedures to resolve claims of more than $20,000. The $20,000 figure refers to the amount in dispute between the claimant and EPA, regardless of the amount of the original claim.[560] The expedited procedures differ from the full arbitration procedures in that the parties agree to receive all required notices by telephone, followed by written confirmation. In addition, the arbitrator selection process is streamlined in that AAA submits a list of five potential arbitrators to each party from which each party may strike two. AAA will then appoint an arbitrator who will serve, subject to any finding of partiality, bias or interest requiring disqualification. The hearing must commence within 60 days of the selection of the arbitrator. Most expedited cases will be heard within one day. The arbitrator's decision is due five days after the close of the hearing unless the parties agree to an extension.

The arbitrator's decision, whether rendered under the full procedures or under the expedited procedures, may be appealed to the United States district court in the district in which the arbitration took place.[561] CERCLA instructs the courts that an award or decision of a member of the Board is binding and conclusive and is not to be overturned except in cases of arbitrary or capricious abuse of the member's discretion. CERCLA further provides that the arbitrator's decision is to have no collateral effect. An arbitrator's award is not admissible as evidence of any issue of fact or law in any other proceeding under CERCLA or any other provision of law.[562]

Finally, § 305.52 of the final rules includes additional miscellaneous provisions. Parties to arbitration must make objections, whether oral or written, at the earliest possible opportunity or will be deemed to have waived the right to object.[563] The final rules also forbid the Administrator, the parties and other interested persons from engaging in *ex parte* communication with the arbitrator.[564]

Merit Systems Protection Board.

Background. Congress passed the Civil Service Reform Act of 1978 (CSRA or Act),[565] to promote a more efficient "civil service while preserving the merit principle in Federal employment."[566] The Act abolished the Civil Service Commission and replaced it with the Merit Systems Protection Board (MSPB or Board). Under the CSRA, the Board is an independent, quasi-judicial regulatory agency created to protect the Federal merit systems from political abuse and to resolve employee grievances within the systems.[567]

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[559] 40 CFR 305.50(a).

[560] 50 *Fed. Reg.* 51200.

[561] CERCLA Sec. 112(b)(4)(G); 40 CFR 305.51(b).

[562] *Id.*

[563] 40 CFR 305.52(a).

[564] 40 CFR 305.52(b).

[565] 5 U.S.C. §§ 1101-8911 (Supp. IV 1980).

To resolve employee grievances, the MSPB began with a formal appeals procedure (FAP) established under the CSRA. The Board, however, examined alternatives to the FAP because of Congressional interest in expediting the personnel actions subject to the Board's appellate jurisdiction.[568] Illustrative of Congressional intent is the Senate report, accompanying CSRA, urging the MSPB to develop alternative methods for resolving appealable matters including "suitable forms of conciliation, mediation, arbitration, and other methods mutually agreeable to the parties."[569]

In 1981, a new chairman of MSPB, familiar with "expedited arbitration" as used by unions, began to focus discussion on that procedure as interest in it increased during the Air Traffic Controllers (ATC) union strike. The appeals from the strikers, terminated from federal employment, eventually increased threefold the FY 81 caseload of the MSPB.[570] With the assistance of the Administrative Conference of the United States (ACUS), the MSPB began development of what became the "Appeals Arbitration Procedure" (AAP). The AAP, later modified as the "Voluntary Expedited Appeals Procedure" (VEAP), is an alternative to the more formal appeal procedure (FAP). The Board's objective was to design an informal, simplified, less costly system to adjudicate routine, non-precedential appeals while preserving fair, impartial forums. The Board's expectations are reflected in its statement of goals and objectives:

- The system will not only be fair and fast, but also one which is recognized and accepted as such by employees and agency management.
- It will encourage the informal resolution of disputes in the proceeding, including settlement by agreement between the parties.
- It will cover as many kinds of appealable matters as are feasible for resolution through the more informal process.
- It will improve the timeliness and cost-effectiveness of the process leading to the resolution of disputed personnel actions.

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[566] S. Rep. No. 969, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. Code Cong. and Ad. News 2723, 2724 (hereinafter, S. Rep. No. 969).

[567] S. Rep. No. 969. The powers and functions of the MSPB are set out in 5 U.S.C. § 1205 (Supp. IV 1980).

[568] Pub. L. 95-454, 92, Stat. 1111 (1078).

[569] S. Rep. No. 969.

[570] In Fiscal 1981, the MSPB issued 5,610 decisions at the regional level as part of the regular caseload and received 10,356 Air Traffic Controller Appeals. U.S. Merit Systems Protection Board, Study of MSPB Appeals Decisions In FY 1981, December 1982 cited in Adams, supra note 170.

- It will exclude sensitive cases requiring more intense adjudicative proceedings, based on the nature, gravity and complexity of the issues involved.

- It will preserve the parties' rights to limited Board review of major procedural and legal errors in the arbitration award.[571]

The MSPB introduced its proposal for the AAP in October 1982 to Federal agencies, unions, bar associations, and public interest groups.[572] Comments were requested and received in December 1982. MSPB modified the plan after reviewing comments and distributed a new version, Bulletin No. 12, for public comment on January 13. MSPB received comments on Bulletin No. 12 through January and February and published interim final rules effective in the Federal Register on March 18, 1983, announcing the introduction of appeals arbitration (AAP), and a pilot study of the procedure to be conducted in four MSPB regions.[573] Comments were invited through July 1, 1983. The preamble to the interim rules did not discuss the comments MSPB received nor reasons for changes from the earlier drafts.

Several important revisions of the early proposals were included in the interim final rules.

MSPB originally took the position that the AAP would only be available to those appellants who were not members of a certified collective bargaining unit. The major concern of union comments was that it would be "discriminatory" and "anti-union" to only provide AAP to non-union members. In the interim final rules, MSPB extended AAP eligibility to include the union appellants.
Perhaps the most important revision from the agency's viewpoint was the proposal in Bulletin No. 12, and retained in the interim rules, to allow agencies a choice in whether AAP would be used. Originally, agencies would have been required to participate in AAP if the Regional Director so directed. All but one agency commented that agency agreement should be necessary. Unions still favored unilateral election of the AAP by the employee.[574] MSPB compromised in Bulletin No. 12 in proposing that if an employee elected AAP, the final decision would be made by the Regional Director after review of the petition for appeal and the agency's response.

Another revision involved the parties' right to petition the full Board for a review of the initial decision. Initially MSPB proposed that the Board would not reconsider any AAP case with the exception of those requested by the Office of Personnel Management. Other appellants could file civil suits from the arbitration decision with a Circuit Court of Appeals or with the U.S. Court of Claims. Both agencies and unions, in their comments, objected to the lack of appeal to the Board. In Bulletin No. 12, the MSPB proposed a change allowing either party to file a petition for review to the full Board if the party could (1) demonstrate harmful procedural irregularity in the proceedings before the arbitration, or (2) demonstrate clear error of law.[575] The interim rules retained this change.

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[571] Merit Systems Protection Board, 48 Fed. Reg. 11399.

[572] The packet was entitled Voluntary Arbitration: An Alternative to Resolution of Employee Appeals.

[573] 48 Fed. Reg. 11399. The four MSPB cities were San Francisco, Chicago, Seattle, and Denver. Dallas later joined the pilot program.

[574] Lawson, Roseann, Evaluation of the Merit Systems Protection Board's Appeals Arbitration Procedure, p. 11.

Appeals Arbitration Procedure. The election of the AAP begins with the agency's notice of proposed action. The notice explains to the employee his right to appeal and his option of using the FAP or AAP. The employee has 20 days to appeal and has two chances to request appeals arbitration; first, at the time of filing a petition for appeal, or, second, within 10 days from the date of the Board's order of acknowledgement to the agency. The agency has 15 days from the date of the Board's order to consent or decline to use AAP. Upon consenting, the agency must file a designation of representative form and a summary of facts and legal issues raised in the appeal. Final decision to process the case under AAP or the FAP is left to the regional director after review of the petition for appeal and the agency's response. The regional director or his designee retains the right to convert the case to a formal appeals procedure (FAP), at any time prior to issuance of the arbitration award, in the event circumstances warrant.[576]

If the appeals arbitration procedure is granted, the regional director will appoint an arbitrator, on a rotating basis, from a panel of presiding officials who are designated for the new procedures and have received special training.[577]

The initial role of the presiding official is that of mediator; to explore the potential for a settlement and to encourage the parties to settle the case voluntarily. If an informal settlement cannot be reached, the presiding official will assume the role of arbitrator and proceed with the hearing if one has been requested. The parties may still reach a voluntary settlement agreement at any time until the issuance of an arbitration award.[578] If the parties voluntarily resolve the dispute without an award, the settlement agreement is final and binding and the appeal will be dismissed with prejudice. If the terms are recorded and signed, they will be made part of the arbitration record and the Board will retain jurisdiction to ensure compliance with the agreement. If the settlement is not recorded, the Board will not retain jurisdiction to ensure compliance.[579] The presiding official has the authority to take all necessary action to conduct a speedy, fair, and impartial hearing and, unless expressly provided otherwise in the regulations, to follow the regulations under 5 CFR Part 1201, Subpart B.[580]

Unique to the AAP is the requirement of both parties to file a Joint

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575. The formal appeals procedures (FAP) uses the less restrictive review standard: "contrary to law, rule or regulation."

576. § 1201.201(a)(b)(c).

577. 48 Fed. Reg. 11399. The training of presiding officials and regional directors for the four pilot study sites was held at MSPB headquarters in Washington, D.C. on March 14 and 15, 1983, three days prior to the introduction of the program.

578. § 1201.216(a).

579. § 1201.216(b)(1)(2).

580. § 1201.204 (C)(D).

Arbitration Record (JAR) with the purpose of bringing the parties together to narrow and focus the issues in dispute. The JAR is to be filed within 30 days from the date of the Board's order of acknowledgement and should include a statement of issues, witness lists, a request for hearing and two possible dates for the hearing.[581] Informal discovery will usually precede preparation of the JAR. While the rights to formal discovery are waived by the parties in electing to use the AAP instead of the FAP, the parties have the duty to include all known relevant materials with their submissions.[582]

Either party may request a hearing which is to be held at the employment site and must be scheduled within a 15-day period following the due date, or receipt, of the JAR.[583] The AAP hearing is similar to but more informal than that under the FAP. Formal rules of procedure do not apply but may be liberally construed and used as a guide to admissibility of evidence, motions, filings of briefs, etc.[584]

Agencies are required to make their employees available as witnesses when requested by the presiding official.[585] The arbitrator may also request the production of additional information or witnesses if needed for resolution of the matter.[586] In the event a party fails to cooperate, the presiding official may impose appropriate sanctions.[587]

Unlike the Formal Appeals Procedure, MSPB keeps no official transcript of the AAP hearing, although the parties may provide for an unofficial one with use of a tape recorder or court reporter.

The record is closed at either (a) the conclusion of the hearing or, if no hearing has been convened, (b) on the date set for receipt of submissions of the parties. The presiding official has discretion to accept additional evidence or arguments after the closing of the record if it can be shown that the new and material evidence was not available prior to closing of the record.[588]

The presiding official is to issue the arbitration award no later than 30 days from the date the JAR was received by the Board, (60 days from the date of the acknowledgement order) which is half the time allowed under the FAP.[589] If no hearing was conducted and settlement was not reached, the presiding official is to issue a written decision within 15 days after the record is closed.[590] The decision is to be briefer in scope than it is under the FAP due to its non-precedential character and reliance on the joint record. It is to include a summary of the basic issues, findings of fact and conclusions of law, a holding affirming, revising or modifying the appealed action, and an order of appropriate relief.[591] The award will become final after 35 days if no petition for review is filed.[592]

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[581] § 1201.202(c).

[582] 48 Fed. Reg. 11400.

[583] § 1201.205(a)(c).

[584] 48 Fed. Reg. 11400.

[585] § 1201.206(a).

[586] 48 Fed. Reg. 11400.

[587] § 1201.213.

[588] § 1201.215(a)(b)(c).

[589] § 1201.204(b).

Under the interim rules, the Board would grant only a limited review of the decision of the presiding official. By electing the AAP, the parties waived their right, which was available under the FAP, to petition for review on grounds of new and material evidence.[593] The Board would only grant review of a petition which established: (a) demonstrated harmful procedural irregularity in the proceedings before the arbitrator, or (b) clear error of law. The Board will issue a final decision no later than 15 days from the close of the respondent's filing deadline. The appellant retains the right under the AAP to file an appeal of the final order or decision of the Board with the U.S. Court of Appeals.[594]

Voluntary Expedited Appeals Procedure. In response to early evaluation findings, the MSPB made several modifications to the AAP in July 1984, before the pilot study was completed. First, the name of the AAP was changed to "the voluntary expedited appeals procedure" (VEAP) to reduce the confusion of the AAP with labor arbitration and to emphasize the parties' right of choice. Second, the MSPB also changed the standard of review of VEAP decisions to be uniform with those of the FAP to ensure fairness regardless of forum. Finally, the MSPB extended the time allowed for its final decision on a petition for review from 15 to 35 days to conform to that permitted by FAP.[595]

Evaluation of Appeals Arbitration. The success of the AAP program can be measured by using the MSPB's statement of goals and objectives for the AAP as a basis for evaluation. It reflects an interest in providing federal employees and agencies with a more expeditious, less costly means of resolving personnel disputes while also affording a fair, impartial forum for hearing these disputes. From the MSPB perspective, employee rights should be balanced against the efficiency of the system.[596] The MSPB would also measure success by the number of parties who use the procedure time after time.[597]

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[590] § 1201.217.

[591] § 1201.217.

[592] § 1201.217.

[593] The waiver requirement was dropped in July, 1984 as a result of the AAP's modification.

[594] § 1201.221.

[595] The provisions for judicial review are found in 5 U.S.C. § 7703.

[596] Meeting of Roseann Lawson and Paul D. Mahoney,, Assistant Managing Director for Management, MSPB, April 19, 1983. Cited in Lawson, Evaluation of the Merit Systems Protection Board's Appeals Arbitration Procedures, Part II - Introduction, p. 19.

At the onset of the program, agencies and appellants shared the concern that procedural and substantive equity might be affected in an expedited procedure and would measure success by fairness to the parties. They would consider the procedure a success if the elements of "due process" were preserved while ensuring that the outcomes remain consistent to those of the more formal procedure.[598] One attorney, who represented employees, believed that to be successful and fair, decisions of presiding officials should reflect the facts and issues raised in the JAR and in the proceedings.[599] Another commentator suggested that the AAP will be successful if it is attractive and workable for inexperienced representatives and pro se appellants.[600] Another appellant's attorney believed that for the AAP to be a success, the presiding officials' awards should withstand judicial review.[601] Finally, from the Congressional perspective, the AAP would be labeled successful if the procedure could get away from the confrontational mode that exists at present and if the procedure could reduce costs.[602]

A study evaluating the AAP pilot program was conducted by the Public Policy Program of the George Washington University under contract with the Administrative Conference of the United States. The study was conducted to evaluate the success of the AAP in achieving the objectives mentioned above. It focused on measures of timeliness, cost effectiveness, equity and fairness. The following is a summary of the study's findings and recommendations.

The study applied a classic evaluation model by treating all AAP appeals cases as members of the experimental group matched against a control group consisting of similar FAP cases in the same regional site. The FAP cases used in matching were chosen from those that were eligible for the AAP but instead followed the FAP. The guidelines used for matching encouraged selection of FAP cases which would have used roughly the same resources if converted to AAP.[603] The study intended to isolate the true effects of the AAP.

The matching process began on July 1, 1983, in the four MSPB regions, and then after October 1, 1983, in the Dallas region which joined the pilot program late. The matching stopped on March 31, 1984. Fifty-four appeals cases formed the experimental groups.[604]

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[597] Paul Trayers, Labor Counsel, MSPB at MSPB Training Session, March 15 and 16, 1983. Lawson, p. 19.

[598] Adams, supra note 170 at 37.

[599] Interview with Joseph Gebhardt, attorney practicing before the Board, May 2, 1983. Lawson, p. 19.

[600] Edward Passman, attorney practicing before the Board in April 18, 1983 article in Federal Times. Lawson, p. 20.

[601] Interview with Joseph B. Scott, attorney practicing before the MSPB, May 18, 1985. Lawson, p. 20.

[602] Interview with James Cowen, Chief Counsel, Subcommittee on Civil Service and General Services, Senate Government Affairs Committee at the time of the debate and passage of the Civil Service Reform Act. Mr. Cowen was the minority counsel to the Subcommittee. Lawson p. 21.

[603] Adams, supra note 170 at 41.

The data used to develop the measures of the AAP's timeliness, cost-effectiveness, and equity and fairness were drawn from administrative records and surveys. The observed differences between the two groups in the four measures of success were tested statistically to determine if they reflect differences due to the appeals procedures used or merely differences due to random error.[605] The statistical findings were supplemented by field observations of the implementation of the AAP.

Implementation of the AAP. The study assessed how faithfully the design of the AAP program had been followed in the field and examined departures from the design to measure the impact on the program's success.

The results were mixed. The MSPB found that it could increase the number of parties exposed to AAP by being flexible in allowing parties to use the AAP even after the election time expired. As a consequence, however, the presiding officials and the parties themselves felt extra pressure to meet the 60 day schedule.[606] The MSPB was also flexible in solving the logistical problems of creating a JAR by allowing the parties to submit separate statements.[607]

The presiding officials varied in their emphasis on their roles as mediators in effectively facilitating voluntary settlements.[608] The study group has recommended more extensive training of the presiding officials.

The study also found that the regions applied different AAP eligibility standards. San Francisco, for example, was very strict in accepting the expediting appeals cases and in closing the appellants' ten-day window for electing AAP. The study group has recommended setting a uniform standard closer to the more flexible one applied in Chicago and Dallas.[609] The experience in Chicago indicated that persistent outreach efforts by MSPB officials also can significantly increase the number of agencies and appellants electing to use the AAP. During the 18 month study, only 102 appeals, just over two percent, of 4,475 appeals filed, were processed under the AAP and VEAP. Chicago handled 59.3% of the total.

Timeliness and Cost-Effectiveness. The study found that the AAP is unequivocally more expeditious than the FAP. The AAP cases in the pilot study were processed in less than half the time of their matched FAP cases.[610] Also, the odds of cases reaching voluntary settlement are one out of seven, which is better than twice those in similar FAP cases.[611]

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[604] The distribution of appeals was as follows: Chicago - 32, Dallas - 4, Denver - 1, San Francisco - 15, and Seattle - 2.

[605] The statistical procedure employed was a "pair wise test of mean differences for correlated samples" from T. H., Wonnacott and R. J. Wonnacott, Introductory Statistics, 2nd ed., New York: John Wiley and Sons, Inc., 1972, pp. 171-173. Adams, supra note 170 at 58.

[606] Adams, supra note 170 at 92.

[607] Id. at 62.

[608] Id. at 92.

[609] Id.

For the MSPB, the AAP is clearly cost-effective at a savings of over 40 percent per case. The agencies have also found the procedure to be less costly in cases where travel was required, where a hearing was requested and witnesses called, and when there was an interest in voluntary settlement.[612] The savings for the appellants was difficult to judge due to the variance among the appeals observed. The difference from the FAP is not statistically significant for that group.

Equity and Fairness. The study focused on whether the gains of cost-effectiveness and time came at the expense of equity and fairness in both substance and procedure. These issues were examined using data drawn from administrative records and mail survey of experimental and control groups.

One of the most important concerns of agencies and appellants was whether the AAP decisions would be consistent with those under the FAP. The study made an indirect test by describing the likelihood that the appeals decision would support the initial agency decision in matched AAP and FAP cases. No difference in the outcome was observed.[613]

Another measure of equity was whether AAP was more accessible to appellants who wished to represent themselves. The results do not point to pro se appellants' ready adoption of the AAP where only 25% of the experimental (AAP) group involved pro se appellants compared to 39% pro se appellants in the control group and 29% pro se appellants in a larger group of FAP cases in the five study sites.[614] The study recognizes that appellants have strong incentives under both procedures to employ counsel.

Another measure of equity is the parties' continued willingness to use the AAP. While the evidence does not indicate a steady increase in the number of appeals adjudicated under the AAP, it does show a continued willingness to use the procedure. In Chicago for example, at least seven agencies consented to use the AAP a second time after using it once.[615] The reason the overall number of cases adjudicated under the AAP remained low was that many of the agencies were reluctant to try the AAP at all. Throughout the pilot study, agencies in three study sites for example consented to use the AAP in little more than ten percent of the appeals eligible whereas appellants consented in no fewer than 25%

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[610] Id. at 95.

[611] Id. at 96.

[612] Id. at 121.

[613] Id. at 120.

[614] Id. at 127.

[615] Id. at 130.

of the cases.[616]

Both the appellants and the agencies who used the AAP were also relatively satisfied with the fairness of the various procedural steps of the AAP. The first procedural step examined was the preparation of the Joint Arbitration Record which is unique to the AAP and intended to bring the sides together to reduce and focus the areas of dispute. The presiding official's response was that the JAR worked "reasonably" well despite initial logistical problems. The agencies and appellants also agreed that the JAR expressed all the important facts and issues but more so from the agency's perspective than the appellants'.

Initially, the parties had expressed concern about the AAP's requirement that they waive their rights to formal discovery which is available, if necessary, under the FAP. The parties' response to the study's questionnaire revealed that less than half of the appellants felt they were able to obtain the information needed to prepare the JAR while six out of ten agency representatives either agreed or strongly agreed that they were able to get the needed information. In comparison to the responses from the FAP group, the AAP fared well although the difference is not statistically significant.[617]

The parties were also satisfied with the use of the informal hearing under the AAP. There is no significant difference in satisfaction between the AAP and FAP in this respect. This response is consistent with the presiding officials' observations that they had already considered the FAP hearings to be rather informal.

Finally, there was some concern that fairness might be sacrificed in the expedited schedule that parties are required to follow in presenting their case. Although the parties responded favorably to the question of whether the AAP allowed enough time for presenting an appeal, their satisfaction is significantly less than the parties appealing under the FAP.[618]

The study found that the parties' general perception was that the AAP was fair and equitable. Seventy-six percent of the appellants strongly agreed or agreed that the AAP was equitable and eighty percent of the agency representatives reached the same conclusion.[619] A comparison of these responses to the responses from the control group showed no statistical difference in the level of the parties' satisfaction.

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[616] Id.

[617] Id. at 136.

[618] Id. at 141.

[619] Id. at 142.

POINTS ON A CONTINUUM: DISPUTE RESOLUTION PROCEDURES AND THE ADMINISTRATIVE PROCESS

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This report was prepared for the Administrative Conference of the United States. The views expressed are the author's alone and do not necessarily reflect those of the Conference, its Committees, or staff. Portions of the report were revised prior to publication to reflect subsequent developments in the case law.

VII
AGENCY OVERSIGHT OF PRIVATE DISPUTE RESOLUTION MECHANISM

Two basic, structural forms of administrative arbitration emerge from the preceding analysis: (1) Programs that are explicitly within the agency itself and are used to resolve issues that would otherwise be decided under the customary agency processes.[217] (2) Programs that decide issues that arise because of agency action, or closely affiliated with it, but which are not actually a part of the agency;[218] while distinct, they can be viewed in some ways as "associated" with the agency. A third model of administrative arbitration -- or, more accurately, administrative dispute resolution -- is where the agency supervises a dispute resolution mechanism ("DRM") that operates as a part of a private organization.

A number of programs require, or permit, private organizations to establish a forum -- a DRM -- for reviewing complaints or other issues that arise with respect to some particular activity. The circumstances are such that if such a program were not established, the agency itself might be required to hold a hearing to resolve the matters presented. Under these programs, the agency may specify minimal procedures that must be followed by the private organization[219] and it will review how well the process is working, but it does not typically sit in review of any individual decision.

The Magnuson-Moss Warranty Act[220] for example is administered by the Federal Trade Commission and encourages warrantors to establish procedures to resolve disputes concerning warranties fairly and expeditiously.[221] The Act requires the FTC to issue rules prescribing the minimum requirements for a DRM to qualify for special treatment. If such a program is established, a complaining consumer must first turn to it before proceeding to court or other remedy.[222] A DRM is required to be independent of warrantor; have procedures that minimize

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217. MSPB, CFTC.

218. FIFRA, Superfund, PBGC.

219. For example, see discussion of Medicare procedures in text associated with notes 130-134, supra.

220. 15 U.S.C. §§ 2301-2310.

221. 15 U.S.C. §

222. 15 C.F.R, § 703.

burdens on the consumer; be financed by the warrantor; and be designed to achieve the basic goals of speed and fairness.[223] These programs can obviously be massively large. The Better Business Bureau, for example, operates the program for some of the auto companies and processes in excess of a quarter of a million disputes over automobile warranties per year.[224]

Programs such as these are caught in a dilemma. On the one hand the procedures used by the DRM must be sufficiently rigorous to provide confidence on the part of the users that they will receive a fair hearing. On the other hand, if the procedures are too stringent, there will be no incentive to establish them -- either because they would be too expensive to operate or because they would not offer an attractive alternative to other available means of resolving the disputes. The tension between the two needs is clear and has been the subject of controversy over the years.[225] Several states have become dissatisfied with the process and have passed "Lemon Laws" going beyond the FTC's minimal procedures.[226] The FTC has recently begun a negotiated rulemaking to review and revise its rules.[227]

What is needed for such a program is to strike the delicate balance of providing an incentive to establish a fair and effective program[228] and an incentive to use the process as opposed to others that may be available -- or to ensure that it is indeed fair and effective if those affected are forced to use it at least in the first instance.

The FTC also entered into a consent decree with General Motors in settlement of its allegation that GM had failed to notify customers of high failure rates of certain automobile components and that constituted a violation of Section 5 of the Federal Trade Commission Act.[229] Instead of fighting the matter through a trial type hearing before the agency itself and on through the courts, the Commission entered into an agreement with GM whereby it would establish a DRM -- the Better Business Bureau -- to determine whether a particular car is afflicted with the problems and what should be done to rectify the matter. Under the process, the BBB attempts to mediate an agreement between the dealer and the customer and, failing satisfaction at that point, the issue is arbitrated.

The process was criticized both on the grounds that a refund should be provided generally to all owners of the affected cars -- whether or not they displayed any of the symptoms -- and that the mediation entailed a burdensome extra step that would likely not prove effective since the customers had already tried and failed to reach agreement with the company. BBB has reported that nearly 90% of the cases in one test sample were settled by mediation, however.[230]

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[223] Appendix III.

[224] Testimony of Dean Determan at ACUS Hearings, supra, note 49.

[225] See, Rossi, Incentives for Warrantor Formation of Informal Dispute Settlement Mechanisms, 52 U.S.C. L. Rev. 235 (1978); Greenburg and Stanton, "Business Groups, Consumer Problems: The Contradiction of Trade Association Complaint Handling," in L. Nader, No Access to Law (1980) at 193.

[226] E.g. Connecticut.

[227] 51 Fed. Reg. 5205 (Feb. 12, 1986).

[228] One person who is familiar with the effect of the Magnuson-Moss Act's "exhaustion" requirement argued that it was often not an incentive at all because it raised other forms of legal uncertainty and potential liability.

[229] In the Matter of General Motors Corporation, Dkt. No. 9145; see Appendix III.

Another major example of an agency's oversight of private dispute resolution mechanisms is the Securities and Exchange Commission relationship with the DRM's of the self-regulatory organizations such as the exchanges and the National Association of Securities Dealers.[231] The Commission must approve particular rules that are adopted by the SRO's, some of which deal with their mechanisms for resolving issues that arise through their actions. The Commission deferred developing rules establishing a nationwide system for resolving disputes between broker-dealers and their customers when the industry organized the Securities Industry Conference on Arbitration which in turn drafted a Uniform Code of Arbitration. The code has been adopted by all ten of the SROs and the Commission. As of 1984, the SRO's had resolved almost 5,000 cases.[232]

Other examples of the private DRMs that are overseen by agencies are the Medicare procedures discussed above[233] and medical ethics panels in hospitals.[234]

Supervised DRMs can provide particular, specific decisions that can serve in lieu of a general regulation.[235] As a defense against what it fears may be more intrusive regulation, industry frequently argues that it will provide needed safeguards, and hence that additional regulation is not needed. Even if the industry developed a satisfactory rule, it will not be effective unless those affected by it have some opportunity to enforce it and that will likely require a means for resolving disputes that arising under the program. These would entail determining whether, in a particular instances, the rule was broken; whether it applies at all; whether it takes into account appropriate considerations; what damages someone sustained; and so on, raising all the issues that arise in an administrative program. One means of dealing with this situation is to encourage the self regulation, but require the establishment of a DRM to resolve the issues that will inevitably arise. Otherwise, either an agency or court will have to resolve the issues or the program will provide a privilege and not right, which of course is very different from the regulation sought to be forestalled.

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[230] Testimony of Dean Determan at ACUS Hearings, supra note 49. The process has been controversial however. See, FTC, Consumer Group Clash over GM Program, Washington Post, p. E3 (October 25, 1985) which quotes the Center for Auto Safety as arguing "that the program is 'a disaster for consumers'." The Center alleged that the reviews of the program have not taken sufficient account of consumers who did not know about the program or who gave up before reaching a final resolution.

[231] See Appendix III for a fuller discussion.

[232] Katsoris, The Arbitration of a Public Securities Dispute, 53 Fordham L. Rev. 279, 284 (1984).

[233] See text accompanying note 130-134 supra.

[234] See, e.g., 50 Fed. Reg. 14,878 (1985) for regulations that implement the Child Abuse Amendments of 1984, P. L. 98-457.

[235] Harter, Dispute Resolution and Administrative Law, supra, note 76.

Several issues need to be considered and balanced when establishing a DRM that is overseen by an agency: What the incentives are to establish the program in the first place -- why would the private organization want to do it; what are the alternatives to doing so. Secondly, why would those affected, such as consumers, want to use it instead of some other process available. Or, if its use is mandatory, then the agency will need to assure the public that minimally acceptable procedures will be followed.[236] Finally, the agency needs to develop an enforcement mechanism by which it will oversee the execution of the processes. That generally means the agency not an individual appeal, but that it will review how well the system is working overall to determine whether the minimal procedures are being met and whether the procedures should be modified.

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[236] What should be minimally required must necessarily depend on the nature of the questions to be resolved. Thus, they process will depend on the subject matter.

APPENDIX III
AGENCY OVERSIGHT OF PRIVATE DISPUTE RESOLUTION MECHANISMS

Securities and Exchange Commission Oversight of Self Regulatory Organizations

The Securities and Exchange Commission oversees the activities of the national securities exchanges and the over the counter securities markets. The SEC's relationship with the exchanges is referred to as self-regulation oversight. As one commentator notes:

> Under a commonly held perception of this relationship, the exchanges and the National Association of Securities Dealers (NASD) supervise their respective markets while the Commission asserts its reserve power only if the SRO's (self-regulatory organizations) initial exercise of authority is inadequate.[620]

In an often quoted passage William O. Douglas, one-time Chairman of the SEC and later Supreme Court Justice describes the relationship between the exchanges and the SEC:

> The exchanges would take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used.[621]

This general description of the SEC's role in the regulation of securities markets may understate the central position the SEC actually holds in the field of securities regulation. Although the emphasis is upon self-regulation, the SEC plays more than a residual role. The SEC's power over this self regulation is clearly set forth in the Securities Reform Act of 1975. This Act sanctioned the Commission's broad authority over the exchanges. An exchange must apply to the Commission to register as a national securities exchange.[622] The Commission is also empowered to "abrogate, add to, and delete from the rules of a self-regulatory organization as may be necessary to insure the fair administration of the SRO and to insure compliance with the Securities Exchange Act."[623] The Commission must also receive notice of all disciplinary actions taken by SRO's against their members and is empowered to review these actions. The Commission may also review denials of membership or participation in an SRO. Finally, the Commission may suspend, revoke, censure or impose limitations upon the activity of an SRO if it finds "after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply" with the Securities Exchange Act or rules promulgated under it, or the SRO's own rules.

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[620] David A. Lipton, The SEC or the Exchanges: Who Should Do What and When? A Proposal to Allocate Regulatory Responsibilities for Securities Markets, 16 UC Davis LR 527, 528 (1983).

[621] Id. quoting W. Douglas, Democracy and Finance 82 (1940) (speech delivered on May 20, 1938).

[622] 15 U.S.C. 78s(b)(1).

[623] 15 USC 78s(c).

The Commission also may at its discretion conduct investigations to determine whether any person has violated, is violating or is about to violate any provision of the Security Exchange Act, its rules or the rules of a National Securities Exchange. The Commission may not, however, seek an injunction or mandamus order against any person for violation of a rule of a national securities exchange unless that exchange is unable or unwilling or otherwise has not taken such action.[624] Thus the Commission has significant power with which to exercise oversight over the self-regulatory organizations.

An example of the interaction between the Commission and the exchanges is the experience of the SEC's encouragement of the use of arbitration for the resolution of disputes between registered broker-dealers and their customers. Binding arbitration clauses are not enforceable with respect to Federal Securities laws,[625] but the Commission has strongly endorsed the use of "fairly administered arbitration procedures as the most cost effective means of resolving certain disputes between broker-dealers and their customers."[626]

On June 9, 1976, the Commission invited comments concerning the development of a nationwide dispute settlement procedure for resolving disputes between registered securities broker-dealers and their customers.[627] The Commission sought to establish a uniform system for resolving disputes involving small claims to be administered by the SROs. The Commission explained "this system could provide for the efficient and economical disposition of grievances and should not be burdensome, complex or costly to the investor; in other words, the system could function in a manner similar to a small claims court." The Commission anticipated that "a streamlined dispute grievance procedure will increase the effectiveness of existing arbitration facilities made available by the American Arbitration Association, The American, Boston, Cincinnati, Midwest, New York, Pacific and Philadelphia Stock Exchanges, the Chicago Board Options Exchange, and the National Association of Securities Dealers." The comments received by the Commission were to be placed in file No. S7-639.

On November 15, 1977, the Commission requested comments on a proposed dispute resolution mechanism prepared by the SEC's Office of Consumer Affairs. The Office of Consumer Affairs recommended a three part integrated nationwide system for complaint processing and resolution of investor disputes after concluding that "existing mechanisms for resolving such controversies viz. litigation and industry sponsored arbitration could be more responsive to the needs for investors."[628] The first stage of the mechanism recommended by the Office of Consumer Affairs consists of requiring brokerage firms to establish a system for the receipt, processing and disposition of investor complaints. The firms would be required to keep records of this system and periodically report on the system to the Commission and the SROs. The second stage would consist of the creation of a uniform mediation/arbitration program. This program would be administered by an independent organization which would attempt to mediate all disputes and provide arbitrators for disputes where mediation is unsuccessful. This stage would include a streamlined arbitration process for resolution of disputes of less than $5,000. The third stage concerns claims of less than $1,000. These claims would be decided by a network of small claims adjusters on the basis of written submissions.

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[624] 15 U.S.C. 78a.

[625] See, Wilco v. Swann, 346 U.S. 427 (1953).

[626] Securities Exchange Act Release No. 19813, May 26, 1983.

[627] Securities Exchange Release No. 12528.

[628] Securities Exchange Release No. 12974.

On April 26, 1977 in Securities Exchange Act Release No. 13470 the Commission deferred direct action on the development of arbitration procedures in response to the securities industry's self-regulatory organizations' decision to establish a conference to consider the implementation of a nationwide investor dispute resolution system. The Commission states "Although the Commission does have extensive authority over the self-regulatory organizations, their rules and procedures, it is of the view that it would not be useful at this time to interpose itself in this area since the industry has manifested its intention to take affirmative action." The SRO's organized the Securities Industry Conference on Arbitration (SICA) which drafted a Uniform Code of Arbitration which has been adopted by all ten of its self-regulatory members and approved by the Commission.

The simplified procedures established by SICA may be applied in any dispute between an investor and a broker-dealer in which the claim involves an amount of $2,500 or less. A person with a claim commences this process by filing a claim letter, a submission agreement (an agreement to submit to arbitration and to abide by its decision), and a $15 deposit with the Director of Arbitration of an SRO. The Director of Arbitration notifies the respondent of the claim and allows the party twenty days in which to file an answer and/or counterclaim. The Director also selects an arbitrator to hear the dispute from a roster maintained by the sponsoring SRO. The arbitrator may request that two additional arbitrators be empaneled to hear any dispute. The parties will be notified of the name(s) and affiliations of the arbitrator(s). Each party may request that an arbitrator be disqualified if the party has cause to believe the arbitrator cannot make a fair and impartial award.

Once selected, the arbitrator will make a decision and grant an award on the basis of the written submissions of the parties unless the investor requests or consents to an oral hearing. The arbitrator may require the parties to submit additional documentary evidence. The arbitrator's decision need not detail the reasons for an award and this decision is final.

This example illustrates the relationship between the SEC and the self-regulatory organizations. The SEC proposed the establishment of uniform arbitration procedures for the administration of small claims, but deferred governmental action when the SROs undertook to institute a program themselves.

Federal Trade Commission

The Federal Trade Commission encourages the development of informal dispute settlement procedures to resolve disputes concerning written warranties as well as disputes concerning matters within the Commission's jurisdiction under Section 5 of the Federal Trade Commission Act. The use of informal dispute settlement procedures to resolve warranty disputes is encouraged in the Magnuson-Moss Warranty Act[629] The FTC also encourages the use of informal dispute settlement procedures through the use of consent orders under Section 5 of the FTC Act. The most significant effort in this area involves the consent order approved in the case.[630]

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[629] 15 U.S.C. §§ 2301-2310.

Informal Dispute Settlement Under the Magnuson-Moss Warranty Act. The Magnuson-Moss Warranty authorizes the establishment of informal dispute settlement procedures by one or more warrantors to resolve disputes concerning written warranties. The Act states, "Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."[631] The Act directs the Federal Trade Commission to issue rules prescribing the minimum requirements for an informal dispute resolution mechanism. These rules appear at 15 CFR Section 703. A warrantor who complies with the Act and the rule promulgated under it may make resort to the mechanism a condition precedent to a civil suit under the Act. The Commission is authorized to review these mechanisms. The Conference Report makes clear, however, that this authority is not intended to preclude the courts from "reviewing the fairness and compliance with FTC rules of such procedures."[632]

The Federal Trade Commission issued its Informal Dispute Settlement Procedure Rule on December 31, 1975.[633] The Commission noted, "the intent of the Act is to provide for a fair and expeditious settlement of consumer warranty disputes, through informal mechanisms established voluntarily by warrantors."[634] The rule seeks to "avoid creating artificial or unnecessary procedural burdens so long as the basic goals of speed, fairness and independent participation are met."[635]

Under the rule, a warrantor must inform a consumer of the existence of the mechanism on the face of the warranty. This notice must include the name and address or toll-free telephone number of the mechanism. The notice must inform the consumer that the mechanism is a prerequisite to a suit under the Magnuson-Moss Act but is not a prerequisite to any other legal remedy.

The warrantor must provide a consumer with either a form to file with the mechanism or a toll-free telephone number to call in the event a dispute arises.[636] The warrantor must also provide the consumer with a description of the mechanism procedures.[637] A warrantor is free to maintain its own wholly internal complaint resolution procedures in addition to establishing a mechanism under Magnuson-Moss so long as consumers are not required to seek redress from this internal process.

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[630] In the Matter of General Motors Corporation, Docket No. 9145 (1983).

[631] 15 U.S.C. § 2310(a)(1).

[632] Consumer Products Warranty and FTC Improvements Act: Conference Report to accompany S.356, December 18, 1974, p. 26.

[633] 40 Fed. Reg. 60190 (1975).

[634] 40 Fed. Reg. 60193.

[635] 40 Fed. Reg. 60193.

[636] 16 CFR 703.2(c)(1).

[637] 16 CFR 703.2(c)(3).

The cost of the mechanism is to be borne by the warrantor. The Commission's rule prohibits warrantors from charging consumers a fee for use of the mechanism.[638] This prohibition satisfies the concerns raised in the House Committee Report which states, "informal dispute settlement procedures must also prohibit saddling the consumer with any costs which would discourage use of the procedures."[639] The Commission's prohibition on charging a fee for use of the mechanism has been criticized as encouraging frivolous complaints.[640] The Commission adopted this position, however, because, 1) the warrantor may compel a consumer to use the mechanism prior to suing under the Act, and 2) the decision of the mechanism is non-binding.[641]

A mechanism established under the Act must function independent of the warrantor's control.[642] The rule requires that a mechanism be "sufficiently insulated" from a warrantor's control or influence but does not prescribe the structure of the mechanism. The majority of the decisionmakers in a given dispute must be persons "having no direct involvement in the manufacture, distribution, sale or service of any product."[643] The rule also includes the general obligation that "members [of the mechanism] shall be persons interested in the fair and expeditious settlement of consumer disputes."[644]

The minimum operating procedures for a dispute settlement mechanism are set forth in 16 CFR 703.5. The mechanism must first notify both parties upon its receipt of a complaint. The mechanism is further directed to "investigate, gather, and organize all information necessary for a fair and expeditious decision."[645] In the event that information obtained from the parties is contradictory, the mechanism must offer each party the opportunity to submit a written rebuttal or explanation. The mechanism may allow oral presentations only in disputes where both the warrantor and the consumer consent. The rule does not require the mechanism to offer this option nor does it prescribe the form of oral presentation which may be offered.

The mechanism must issue a decision within 40 days of receiving a complaint. This time limit may be extended if the delay is attributable to the consumer. The mechanism decision is non-binding. Upon making its decision, the mechanism must determine the extent to which the warrantor will abide by its terms and inform the consumer of this fact. The mechanism must also monitor the performance of the parties and keep statistics of the number of disputes resolved and the degree of warrantor compliance.

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[638] 16 CFR 703.3(a).

[639] House, Committee on Interstate and Foreign Commerce, Consumer Product Warranties and FTC Improvements Act, Report to accompany HR 7917, June 13, 1974, p. 40.

[640] 40 Fed. Reg. 60204.

[641] Id.

[642] 16 CFR 703.3(b).

[643] 16 CFR 703.4(b).

[644] 16 CFR 703.4(c).

[645] 16 CFR 703.5(c).

The informal dispute settlement mechanism authorized by Magnuson-Moss is a voluntary procedure. A warrantor who establishes a mechanism may, however, make resort to it a prerequisite to a lawsuit under Magnuson-Moss. Although the mechanism decision is non-binding, it is admissible in court.[646]

Informal Dispute Settlement Under Section 5 of the FTC Act. The FTC has begun to encourage the establishment of informal dispute settlement procedures under its authority granted in Section 5 of the Federal Trade Commission Act to prevent businesses from pursuing unfair or deceptive trade practices. A principal example of this effort is a recent agreement reached between the FTC and General Motors (GM). In 1983 the Commission approved a proposed consent agreement with General Motors Corp. (GM) settling In the Matter of General Motors Corporation.[647] The complaint filed by the FTC in August, 1980 alleged that GM violated Section 5 of the FTC Act by failing to notify customers of serious problems or defects in its products. The complaint defines serious problems or defects as "the occurrence or likely occurrence of an abnormal number of failures or malfunctions of a component, or group of components or systems where such failures or malfunctions are costly to correct or may substantially affect the quality, reliability, durability or performance of a motor vehicle."[648] The complaint lists three components as illustrative of the existence of defects in GM motor vehicles. Specifically, the complaint alleged defects existed in 1) the THM 200 transmission, used in five to six million automobiles since 1976, 2) the camshaft used in fifteen million 305 and 350 cubic inch V-8 engines since 1974, and 3) the fuel injection pumps and fuel injectors used in half a million diesel engines since 1977. The complaint alleges GM knew or should have known of the existence of problems or defects in its products and failed to notify consumers of these facts. The failure to disclose the existence of serious problems or defects is alleged to constitute an unfair or deceptive act or practice in or affecting commerce in violation of Section 5 of the FTC Act.

Under Section 5 of the Act after the Commission issues a complaint a hearing is held to allow the party to show why the Commission should not issue an order compelling the party to cease and desist from the violation charged. The Commission's decision is reviewable by the U.S. Court of Appeals; findings of fact, however, if supported by evidence are conclusive. After the practice has been determined to be unfair or deceptive and a cease and desist order has become final, the Commission may seek consumer redress under Section 19 of the Act. Under this Section the Commission may commence a civil action against a party subject to a cease and desist order and obtain consumer relief if a court is persuaded that the act or practice involved is one which a reasonable man would have known under the circumstances was dishonest or fraudulent. In such a situation a court may grant relief as it finds necessary to redress injury to consumers resulting from the deceptive act or practice. Section 19(b) states, "such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification" of the deceptive act or practice. In the case of the General Motors agreement, the Commission chose to forego this litigation option in favor of the settlement agreement.

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[646] 15 U.S.C § 2310(a)(3), 16 CFR 7035(j).

[647] Docket No. 9145.

[648] Complaint, p. 1.

Under the consent order signed by the Commission, GM agreed to establish a nationwide arbitration program to settle customer complaints concerning GM powertrain components, including transmissions, camshafts and fuel injection systems. This arbitration program expands upon an existing arbitration program, the Council of Better Business Bureau's National Mediation/Arbitration program in which GM has participated since 1981. The program established under the consent order modifies BBB's existing arbitration program in several fundamental respects. Under BBB's existing program, upon receiving a consumer complaint the BBB staff contacts the business involved in the dispute and attempts to resolve the dispute through mediation between the consumer and the business. If mediation fails, the parties may agree to enter into binding arbitration. The consumer pays no fee for participation in the program. The mediation/arbitration steps remain the same under the FTC consent order except that under the consent order the arbitration result is binding only upon GM; the consumer remains free to reject this result and seek compensation in court.

Arbitrators are drawn from the rolls of BBB's trained volunteer arbitrators. The consumer and GM each receive a list of 5 potential arbitrators whom they must rank in order of preference. BBB then appoints the individual with the highest mutual rating as arbitrator. Under the consent agreement GM must strike from consideration any arbitrator who has heard three or more disputes involving the components specified in the order. This situation should not arise however as it is BBB's practice to limit its arbitrators to no more than two cases for the same division of GM. This serves to avoid unfair selection advantage.[649] Technical experts may be provided by the BBB to assist the arbitrator in making a decision. The parties, however, remain free to bring their own technical experts to testify at the arbitration.

The arbitrator is to render a decision within 10 days. The BBB states that "decisions by the arbitrators, who represent a cross section of their communities, will be based on standards of consumer expectation rather than legal or engineering standards."[650] The decisions are intended to reflect the consumers conception of fairness.

GM agreed to submit all complaints concerning powertrain components to this arbitration process. Arbitration will be offered initially in 39 cities, however BBB is prepared to administer GM cases in all of its 156 Bureaus.[651] This program is open to all individuals with complaints concerning GM powertrain components, regardless of whether the consumer still owns the automobile.

GM agreed to notify by direct mail all those who have complained either to the FTC, a state agency or GM about a specified component of the existence of

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649. Comments of Council of Better Business Bureaus, FTC Docket No. 9145, p. 2036.

650. Comments of Council of Better Business Bureaus, FTC Docket No. 9145, p. 2026.

651. Letter from Dean W. Determan, BBB Mediation/Arbitration Division to Carol Crawford, FTC Bureau of Consumer Protection, June 17, 1983, FTC Docket No. 91455, p. 1740-1.

the arbitration program. GM also agreed to publicize the arbitration program in full page advertisements in national magazines to appear initially twice and later three times each year. GM will also maintain a toll-free telephone number to provide information concerning this program. The consent agreement binds GM for a period of eight years.

In addition to agreeing to submit all powertrain component disputes to the BBB's arbitration process GM also agreed to make its product service publications (PSPs) available to consumers for the next eight years. PSP's are notices and articles distributed to GM dealers and employees which describe repair and maintenance procedures for GM vehicles. These documents may help consumers identify the source of problems they have experienced with GM cars. GM also agreed to prepare an index of these previously internal documents and to make the index and the documents themselves available to the public. These indexes will begin with the model year 1982. Under the consent agreement GM also agreed to publicize the availability of the PSP's in the same manner as it will publicize the existence of the arbitration process. GM is permitted to charge consumers for each PSP ordered in accord with a price scale established in the consent order. Consumers may also obtain subscriptions of all PSPs for a given model year, beginning in 1984, at a cost not to exceed a reasonable cost or the cost charged to GM dealers.

The Federal Trade Commission and GM also developed "Background Statements" or fact sheets which consumers may submit to an arbitrator. A separate background statement was prepared to address the THM 200 transmissions, camshafts and lifters, and diesel fuel injection systems. The purpose of these statements is to provide arbitrators with a general background of the dispute involving these specific powertrain components.

This consent agreement has been described as the best alternative available by which the Commission may obtain redress for consumers who purchased GM cars with powertrain defects. The Commission's rejection of GM's offer to establish this arbitration program would have left GM car owners awaiting resolution of the FTC's complaint against GM through litigation -- a process estimated to take up to ten additional years. As FTC Commissioner Patricia P. Bailey comments, "the settlement offers the commission the fastest and indeed the only feasible way to redress the injuries suffered by many GM owners. Our sole alternative is continued litigation which would take until at least the end of the decade to resolve."[652] Commissioner George W. Douglas agrees with Commissioner Bailey noting "while the settlement is not perfect -- as is true of any negotiated agreement -- it nevertheless provides an immediacy of relief and a far higher degree of certainty for a much wider range of injured consumers than the Commission could expect to secure through litigation."[653] The GM consent agreement was criticized by FTC Commissioner Michael Pertschuk. He argued that despite the attractiveness of several of the features of this program, arbitration which resolves consumer disputes on an individual case-by-case basis is inappropriate in a situation where "there is proof of systematic defects common to an entire class of similarly situated consumers."[654] Commissioner Pertschuk contends "the only rational and equitable remedy for the common injury suffered in a case like this is automatic compensation for damages, not standardless mini-trials pitting individual consumers against the largest company in the world."[655] He would have preferred the Commission settle the case by obtaining direct automatic refunds for consumers as had been obtained in several cases in the past. Commissioner Pertschuk notes however that GM refused to agree to any direct redress program in settlement negotiations.

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[652] Statement issued April 26, 1983.

[653] Statement issued November 16, 1983, FTC Docket No. 9145, p. 2722.

[654] Statement issued, April 26, 1983.

The majority of FTC Commissioners believes GM's establishment of a private dispute resolution mechanism designed to speedily resolve disputes, coupled with the increased disclosure of information contained in GM's PSPs and the availability of FTC/GM background statements afforded the Commission the best opportunity for providing GM car owners with a viable remedy for injuries suffered as a result of purchasing defective GM cars. The Commission preferred this consent agreement to the alternative of pursuing resolution of the dispute through protracted litigation.

During the 60 day public comment period which followed the Federal Register's publication of the consent agreement the Commission received comments from consumers, consumer advocates, GM, the Council of Better Business Bureaus, state attorneys general and other interested parties. GM defends the consent order as a reasonable negotiated compromise to a suit the FTC had little chance of winning. Initially GM notes the long delays and difficult course the Commission would have to pursue in order to obtain consumer redress through litigation. The Commission would have to win in an administrative proceeding under Section 5 of the FTC Act, succeed through appeal, then file suit in a U.S. District Court under Section 19 for consumer redress and succeed through that appeal. GM contends that the FTC's Section 5 case is grounded in a novel ill-defined legal theory. The FTC alleged GM committed an unfair or deceptive trade practice in violation of Section 5 by failing to disclose to consumers the existence of abnormally high rates of failure in certain of its products. GM comments "exhaustive legal research of this theory corroborates that neither the Commission nor any court has ever announced a duty to disclose abnormal failure rates."[656] GM contends that even if this theory were accepted by the Commission and the courts it has a strong factual defense with which to prove that its products performed satisfactorily.

GM argues that an FTC effort under Section 19 of the Act, which is necessary to obtain consumer redress, has less chance for success than a case under Section 5. GM points out that in order to succeed under Section 19 the Commission must prove to a court that GM's failure to disclose failure rates constitutes conduct which "a reasonable man would have known under the circumstances was dishonest or fraudulent." GM concludes that such a judgment would be difficult to obtain where the Commission relies upon a legal theory being applied for the first time which consists of vague terms such as the failure to disclose the existence of abnormal failure rates. Finally, GM explains its motivation for settling the case as resulting from a desire to resolve a lawsuit which has generated a great deal of adverse publicity.

The attorneys general of 29 states filed a joint comment concerning the FTC/GM consent agreement. The attorneys general focused on several aspects of this agreement rather than upon the relative merits of settlement versus litigation. Their comments criticize the notification procedures provided in the agreement, the mediation stage required in the BBB program, and the use of arbitration to resolve these disputes.

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[655] Statement issued November 16, 1983, FTC Docket No. 9145, p. 2716.

[656] FTC Docket No. 9145, p. 2198.

The agreement requires GM to notify individuals who have registered complaints with either the FTC, a state agency or GM of the existence of the arbitration program. The attorneys general contend that notice should be sent to all owners of record. They criticize the order's national advertisement requirement as lacking specificity. GM may comply with this requirement by explaining and promoting the arbitration process without mentioning the allegations of the FTC complaint or the specific products named in the complaint.

The attorneys general also criticize the BBB requirement for mediation prior to arbitration. They view this step as excessive. The comment states "most owners who have complained about defects have already failed to resolve their disputes by dealing with GM's zone managers. To require them to repeat this once-failed process may strike some consumers as a frustrating waste of time. Consequently, they may well decide pursuing remedies is not worth the trouble."[657] The attorneys general also criticize the current rate at which BBB resolves disputes through mediation (ninety percent). They felt that such a high percentage of dispute resolution through mediation, in the absence of set parameters for relief, indicates that personal factors such as a consumer's sophistication or perseverance rather than the merits of a case determine whether a consumer receives redress.

Finally the attorneys general criticize the use of arbitration to resolve a large number of suits alleging common or systemic defects. They argue that the background or fact statements prepared by GM with the FTC fail to provide enough information to insure any uniformity in the resolution of disputes.

The Council of Better Business Bureaus' comments to the consent order report the results of a study concerning 180 completed arbitration cases concerning GM components specified in the order. One-half of these cases concerned the THM 200 transmission, one-half concerned camshafts and one case involved a diesel fuel injection failure. These arbitrations account for approximately 11% of all complaints filed with BBB concerning these components. The remaining 89% of these complaints were resolved through mediation. The BBB has no data on the result of the mediations. Data on mediations will be kept under the terms of the consent order. In arbitrated cases consumers received awards in 54% of the cases. BBB reports that 43% of these awards were for the full amount of the repair bill. The average award to the consumer in a transmission case was $348 and in a camshaft case $363. Reasons cited by arbitrators for not finding in favor of the consumer include the car being too far out of warranty (39 cases), poor maintenance (31 cases), and the lack of proof of repairs or maintenance (24 cases).[658]

The Center for Auto Safety also filed comments with the FTC concerning the consent order. The Center criticized the use of arbitration to resolve these disputes, the background statements prepared by GM and the FTC, BBB's capacity to handle the number of complaints which may be filed, and the dates from which

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[657] FTC Docket No. 9145, p. 1893.

[658] All statistics taken from comments submitted by Council of Better Business Bureaus, FTC Docket No. 9145, p. 2039-40.

GM's product service publications will be made available. The Center also noted a further drawback to the agreement. According to the Center for Auto Safety, GM has entered into negotiations with several GM consumer groups, particularly owners of GM diesel motor vehicles. The Center reports for example that a consumer group, Dieselgate, negotiated a claims procedure with GM which has handled over 2,000 claims and resulted in payments to consumers averaging more than $1,000. The Center reports at least two other groups, Lemon on Wheels (NY), and DOGMAD (CA), have also processed hundreds of claims each. The Center predicts that the consent order will crowd out these successful private efforts as GM will direct all claims to the BBB program.

Despite the variety of criticisms levelled at the consent agreement the Commission approved it on November 16, 1983. The Commission's responses to those who filed public comments stress the substantial and immediate benefits the agreement provides. It cautions critics to weigh the imperfections of the redress mechanism established by the consent order against the prospect of litigating the case an additional seven to ten years.

MCMLXIV

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1 CFR § 305.86-7

OFFICE OF
THE CHAIRMAN

Recommendation 86-7

Case Management as a Tool for Improving Agency Adjudication

Adopted December 5, 1986

Reducing the delay, expense and unproductive legal maneuvering found in many adjudications is recognized as a crucial factor in achieving substantive justice. In recent years, the negative side effects of civil litigation and agency adjudication procedures have begun to receive increased attention, and many judges, informed scholars and other experienced observers now cite lawyer control of the pace and scope of most cases as a major impediment. In the federal judicial sphere, and increasingly in the state judiciary, a consensus is developing that efficient case management is part of the judicial function, on a par with the traditional duties of offering a fair hearing and a wise, impartial decision. Many federal district judges have begun to practice and advocate increased intervention to shape and delimit the pretrial or prehearing process.

Some federal agencies have begun to make regular use of case management processes wherein those who decide cases interject their informed judgment and experience early in the pretrial stage, and consistently thereafter, to move cases along as quickly as possible within the bounds of procedural fairness. One such agency is the Department of Health and Human Services ("HHS"), whose Departmental Grant Appeals Board ("DGAB" or "Board") makes active, planned use of special managerial procedures. The Board, which decides cases brought by state and local governments or other recipients of HHS grant funds, has a three-tiered process that relies extensively on use of action-forcing procedures for completing each stage of a case. The Board adjudicates almost all its cases--well over two hundred dispositions and one hundred written decisions annually with an average "amount in controversy" in excess of one million dollars--in three to nine months. Most disputes before it involve financial issues concerning the allowability of grantee expenditures, but the Board's jurisdiction extends also to disputes over grant terminations and some renewals. A recent study[1] indicates that the Board's process reduces the opportunity for maneuvering by the parties, facilitates an expeditious, inexpensive disposition of all but the most complex cases, and is overwhelmingly approved by most attorneys who practice before it.

The Board's success should not be discounted because won in an environment unusually favorable to efficient dispute resolution.[2] The fact is that similar procedures are now used with apparently equal success at other agencies. They merit the attention of appeals boards, administrative panels, administrative law judges ("ALJs") and all others involved in the decisional process. Though recognizing that many factors affect the procedures to be followed in any particular dispute, the Administrative Conference encourages this trend toward reducing the transaction costs of agency proceedings and believes that this is a key responsibility of all presiding officers and their supervisors. The Conference has, in several contexts, already called on federal agencies to make greater use of internal time limits,[3] alternative means of dispute resolution,[4] and case management and other techniques[5] to expedite and improve their case handling. The Conference now calls upon all personnel who conduct or oversee processing of adjudicative proceedings for the federal government to make more determined efforts to use the kinds of case management methods described below as may be appropriate.

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[1] This recommendation is based largely on the report "Model for Case Management: The Grant Appeals Board" by Richard B. Cappalli (1986), which explores how the methods described separately below interact in an integrated case management system.

[2] *E.g.*, a moderate caseload per judge, a shared program objective among all parties and a long-term relationship between the agency and the claimant.

RECOMMENDATION

The Conference encourages the prompt, efficient and inexpensive processing of adjudicative proceedings. Federal agencies engaged in formal and informal adjudication should consider applying the following case management methods to their proceedings, among them the following:

1. ***Personnel management devices.*** Use of internal agency guidelines for timely case processing and measurements of the quality of work products can maintain high levels of productivity and responsibility. If appropriately fashioned, they can do so without compromising independence of judgment. Agencies possess and should exercise the authority, consistent with the ALJ's or other presiding officer's decisional independence, to formulate written criteria for measuring case handling efficiency, prescribe procedures, and develop techniques for the expeditious and accurate disposition of cases. The experiences and opinions of presiding officers should play a large part in shaping these criteria and procedures. The criteria should take into account differences in categories of cases assigned to judges and in types of disposition (e.g., dismissals, dispositions with and without hearing). Where feasible, regular, computerized case status reports and supervision by higher level personnel should be used in furthering the systematic application of the criteria once they have been formulated.

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[3] Recommendation 78-3 calls on all agencies to use particularized deadlines or time limits for the prompt disposition of adjudicatory and rulemaking proceedings, either by announcing schedules for particular cases or adopting rules with general timetables for their various categories of proceedings. *Time Limits on Agency Actions*, 1 CFR § 305.78-3. The Conference has also called on agencies to establish productivity norms and otherwise exercise their authority to prescribe procedures and techniques for accurate, expeditious disposition of Social Security claims and disputes under grants. *E.g.*, *Procedures for Determining Social Security Disability Claims*, 1 CFR § 305.78-2; *Resolving Disputes under Federal Grant Programs*, 1 CFR § 305.82-2.

[4] Recommendation 86-3 calls on agencies to make greater use of mediation, negotiation, minitrials, and other "ADR" methods to reduce the delay and contentiousness accompanying many agency decisions. *Agency Use of Alternative Means of Dispute Resolution*, 1 CFR § 305.86-3. The Conference has called previously for using mediation, negotiation, informal conferences and similar innovations to decide certain kinds of disputes more effectively. *E.g.*, *Procedures for Negotiating Proposed Regulations*, 1 CFR §§ 305.82-4, .85-5; *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR § 305.84-4; *Resolving Disputes under Federal Grant Programs*, 1 CFR § 305.82-2.

[5] Many of the practices recommended herein reflect the advice contained in the *Manual for Administrative Law Judges*, prepared for the Conference by Merritt Ruhlen. Recommendation 73-3 advises on using case management in adjudicating benefit and compensation claims. It calls for continuous evaluation of adjudicative performance pursuant to standards for measuring the accuracy, timeliness and fairness of agency procedures. *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 1 CFR § 305.73-3. In addition, Recommendation 69-6 urges agencies to compile and use statistical caseload data about their proceedings. *Compilation of Statistics on Administrative Proceedings by Federal Department and Agencies*, 1 CFR § 305.69-6.

2. *Step-by-step time goals.* Case management by presiding officers and their supervisors should be combined with procedures designed to move cases promptly through each step in the proceeding. These include (a) a program of step-by-step time goals for the main stages of a proceeding, (b) a monitoring system that pinpoints problem cases, and (c) a management committed to expeditious processing. Time guidelines should be fixed in all cases for all decisional levels within the agency, largely with the input of presiding officers and others affected. While the guidelines should be flexible enough to accommodate exceptional cases and should maintain their non-obligatory nature, they should be sufficiently fixed to keep routine items moving and ensure that any delays are justified. Agencies should encourage a management commitment by including specific goals or duties of timely case processing in pertinent job descriptions.

3. *Expedited options.* Agencies should develop, and in some instances require parties to use, special expedited procedures. Different rules may need to be developed for handling small cases as well as for larger ones that do not raise complex legal or factual issues.

4. *Case file system.*

(a) Agencies should develop procedures to ensure early compilation of relevant documents in a case file. This will help the presiding officer delineate the legal and factual issues, the parties' positions and the basis for the action as promptly as possible. The presiding officer may then structure the process suitably and issue preliminary management directives.

(b) Disputes preceded by party interactions or investigations which create a substantial factual record, as in most contract and grant disputes, are especially amenable to this approach. Cases involving strong fact conflicts or in which data are peculiarly within the possession of one party who has motivations to suppress them may be less suitable for a case file system.

5. *Two stage resolution approaches.* In proceedings where the case file system is less appropriate, as where factual conflicts render discovery important, agencies should consider using a two-phase procedure.

(a) Phase one might be an abbreviated discovery phase directed by a responsible official, with the product of that discovery forming the "appeal file" for the next phase. Alternatively, parties could be channeled into a private dispute resolution mode, such as mediation, negotiation or arbitration, which, even if unsuccessful, can serve to define major issues and to advance development of the record. Before employing this alternative, agencies would have to determine whether the confidentiality rule that normally attaches to arbitration, mediation and negotiation is so critical that it cannot be abandoned for the sake of a more efficient second stage.

(b) A second stage, if necessary, should proceed under active case management, as recommended.

6. *Seeking party concessions and offering mediation.* Presiding officers should promote party agreement and concessions on procedural and substantive issues, as well as on matters involving facts and documents, to reduce hearing time and sometimes avoid hearings altogether. Agencies should also (a) encourage decisional officers to resolve cases (or parts thereof) informally, (b) provide their officers training in mediation and other ADR methods, and (c) routinely offer parties the services of trained mediators.

7. ***Questioning techniques.***

(a) Requests for clarification or development of record. If a party makes a statement in a notice of appeal, brief, or other submission which a presiding officer does not understand, doubts, or wishes clarified, the officer should consider requiring the party to expand upon its position. The ambiguity may relate to a factual matter, or an interpretation of a legal precedent or a document. Similarly, by preliminary study of the case file, the presiding officer could identify missing information and require the party with access to such information to remedy the deficiency. The officer could also issue "invitations to brief" difficult questions of statutory interpretation or the like.

(b) Written questions for conference or hearing. The presiding officer should manage cases so as to limit issues, proof, and argument to core matters. Having ascertained the factual and legal ambiguities in each side's case by careful study of the briefs and documentation submitted, the presiding officer should structure a prehearing conference or hearing as a forum for addressing these ambiguities by seeking responses to carefully formulated questions and providing appropriate opportunity for rebuttal. In this way, and by otherwise seeking to identify the specific questions in dispute early on, the presiding officer would focus parties' attention on key issues and deflect unproductive procedural maneuvers.

8. ***Time extension practices.*** Time extensions should be granted only upon strong, documented justification. While procedural fairness mandates that deadlines may be extended for good cause, presiding officers should be aware that casual, customary extensions have serious negative effects on an adjudicatory system, its participants, and those wishing access thereto. Stern warnings accompanying justified extensions have had good success in curtailing lawyers' requests for additional time.

9. ***Joint consideration of cases with common issues.*** Whenever practicable and fair, cases involving common questions of law or fact should be consolidated and heard jointly. Consolidation could include unification of schedules, briefs, case files and hearings.

10. ***Use of telephone conferences and hearings.*** Presiding officers should take full advantage of telephone conferences as a means to hear motions, to hold prehearing conferences, and even to hear the merits of administrative proceedings where appropriate. While telephone conferences may be either employed regularly for handling selected matters or limited to a case-by-case basis at the suggestion of the presiding officer or counsel, experience suggests that maximum benefits are derived when telephone conferences are made presumptive for certain matters.

11. ***Intra-agency review.*** Any subsequent intra-agency review of an initial adjudicative decision should generally be conducted promptly pursuant to flexible, preestablished time guidelines and review standards.

12. ***Training.*** Agencies should offer, and presiding officers seek, training in case management, mediation, negotiation and similar methods, and should be alert to take advantage of them. The training should be carried out with the advice and aid of other federal agencies and groups with expertise.

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FTC Adopts Mandatory 'Fast Track' Rule for ALJ Cases

By David Berreby

The Federal Trade Commission, rejecting the objections of a number of lawyers who practice before it, has established a six-month deadline for the preparation of cases before its administrative law judges.

Even lawyers who oppose this mandatory "fast track" rule, which applies to FTC-initiated cases, agree that it will substantially increase the pace of proceedings before the FTC. The rule, effective November 12, requires the administrative law judge on each case to set a trial date within two weeks of the mandatory scheduling conference. That date cannot be more than six months away, unless the proceeding is unusually complex or there are circumstances "beyond control of the parties." *FTC Rules of Practice and Procedure*, §3.21.

Lawyers who oppose the change contend that it would give FTC attoneys an unfair advantage in preparing for hearings before administrative law judges, and for the subsequent litigation that often results when a company appeals an ALJ's ruling to a federal district court.

Attorneys who formally registered their objections when the proposed rule was published for comment in 1985 included a group of six prominent practitioners headed by James T. Halverson of New York's Shearman & Sterling, the chairman of the Antitrust Law Section of the American Bar Association.

"We felt it was a little bit of a Star Chamber procedure, because we don't have the time to prepare that they do," said Irving Scher, one of the signers of the Halverson statement and a partner at Weil, Gotshal & Manges in New York, who has practiced before the FTC for more than 20 years.

Head Start

"They have all the time they need to investigate, and they have broad powers. By the time they file they've finished their discovery and they don't have to reveal much of their case to you. They say, 'You'll have a chance to learn all that at the hearing,'" said Mr. Scher. "My experience has been that when I go to discovery, they start fighting it, which is a right I didn't have when they were investigating."

The commission, however, decided that many cases take longer than six months to reach trial only because the parties know the time is available.

"In the past, most Commission cases

(continued on page 15)

FTC Adopts 'Fast Track' Rule

(continued from page 5)

have not been brought to trial this rapidly," the FTC acknowledged in the Oct. 10 ruling that formally adopted the new regulation. "It is intended, as a result of these changes, that all cases that can be brought to trial within this schedule be prepared at this pace."

"We're not trying to harass people into settling because they don't have time to prepare their cases. We're only trying to eliminate unnecessary delay," said Marc L. Winerman, an attorney in the FTC general counsel's office. "The key issue is whether the respondents have enough time to prepare for trial. The commission's position is that they have sufficient time—except in extraordinary cases, which is why the exceptions exist."

The commission's ruling points out that, because of various pre-conference procedures that can take up to two months, the new rule really gives defense counsel eight months from the filing of an FTC complaint to prepare a defense. It goes on to cite a number of recent proceedings that were resolved within that amount of time.

Mr. Winerman said he did not know how long the average case takes, nor what percentage of recent cases have taken longer than the new rules would allow. "A lot are over in six months or less," he said, "but some cases have easily taken a decade."

The commission adopted the rule "on the general theory that things should be streamlined," said Mr. Winerman. "There wasn't any specific case that made everyone throw up their hands and say, "We've got to change the rules."

The new rule attempts to quicken procedures in several ways. Besides the six-month deadline, for instance, the rule requires parties to exchange nonbinding statements of claims and defenses before the scheduling conference so that the issues can be focused early in the case. The rule also mandates that the scheduling conference be held no later than ten days after the filing of the last nonbinding statement, and the first such statement is due within ten days of the respondent's answer.

The new rule was one of several proposals for changes designed to speed up FTC proceedings. Other proposed changes included: dropping an exhortation to lawyers "to make every effort to avoid delay" and replacing it with a requirement that lawyers "complete each stage without delay"; mandating that ALJs set a target date for the completion of evidentiary hearings; authorizing ALJs to impose sanctions for noncompliance with the six-month deadline; and requiring that lawyers filing petitions or motions certify that they have made a "good faith" effort to settle the case, or at least reduce the number of contested issues.

The commission decided not to adopt the first three on the grounds that they are unnecessary. It did enact the last, which has aroused little controversy.

In its official ruling, the commission cited the growing importance of "effective case management," noting that Rule 16(b) of the Federal Rules of Civil Procedure had been modified in 1983 to require a scheduling order in most civil suits. The order must set time limits for joinder of parties, filing of motions and conduct of discovery, and also may set the dates for pretrial conferences, trial and other matters. That order must issue within 120 days of the filing of a complaint.

The judgment an ALJ must make in implementing the new FTC rule, the commission held, "is little different from the judgment a judge or magistrate must make under Rule 16."

Proposals for "fast track" rules are not limited to the FTC. Earlier this year, Richard McMillan Jr. and David B. Siegel of Washington, D.C.'s Crowell & Moring suggested that the Federal Rules of Civil Procedure be revised to allow parties the option of choosing a fast-track procedure in return for a guaranteed trial date, perhaps within 12 months. (*Alternatives*, April 1985.) Some state court programs, such as the Economical Litigation Project (ELP) run on an experimental basis in two Kentucky counties, also contain substantial fast-track elements.

Nor is this the first foray of the FTC into the field of alternative dispute resolution. In the past few years, the commission has established two large arbitration mechanisms for resolving consumers' disputes with a home construction company and an automobile manufacturer. (*Alternatives*, July 1985.)

The FTC's New Six-month Rule: Text and Rationale

Editor's Note: Reprinted below is Revised Section 3.21 of the Rules of Practice and Procedure of the Federal Trade Commission. The rule, which became effective November 12, is intended to expedite those adjudicative proceedings that are initiated by FTC complaints. The rule will be codified at 16 C.F.R. Part 3.

Immediately following the text of the new rule are excerpts from FTC comments explaining and justifying the revision. Those excerpts discuss the views of several commenters to the rule, including the FTC's administrative law judges ("ALJ's"), the New York law firm of Sullivan & Cromwell and James T. Halverson, the chairman of the American Bar Association's Section of Antitrust Law. Mr. Halverson's remarks represent the individual views of himself and five other Section officials who frequently appear before the FTC. Footnotes have been omitted.

Section 3.21 is revised to read as follows:

§3.21 Prehearing Procedures

(a) Nonbinding statements—Not later than ten days after the answer is filed by the last answering respondent, complaint counsel shall file a nonbinding statement setting forth in detail the theory of the case, the issues to be tried, and what complaint counsel expect their evidence to prove. Not later than ten days after complaint counsel's statement is served, each respondent shall file a nonbinding statement setting forth in detail the respondent's theory of the defense, the issues to be tried, and what the respondent expects its evidence to prove. Such statements may be modified upon completion of discovery or at such other times as the Administrative Law Judge may direct.

(b) Scheduling conference—Not later than ten days after all respondents have filed the nonbinding statement required by subsection (a), the Administrative Law Judge shall hold a scheduling conference. At the scheduling conference, counsel for the parties shall be prepared to address their factual and legal theories, potential stipulations of law, fact, or admissibility of evidence, a schedule of proceedings, possible limitations on discovery, and other possible agreements or steps that may aid in the orderly and expeditious disposition of the proceeding.

(c) Prehearing scheduling order—Not later than fourteen days after the scheduling conference, the Administrative Law Judge shall enter an order that sets forth the results of the conference and establishes a schedule of proceedings, including a plan of discovery and dates for the submission and hearing of motions. The schedule shall provide for the commencement of the evidentiary hearings within six months after entry of the order, unless the Administrative Law Judge determines that a later date is necessary because of the complexity of the case or circumstances beyond the control of the parties. The Administrative Law Judge may modify this order for good cause shown.

(d) Additional prehearing conferences and orders—The Administrative Law Judge may hold additional prehearing conferences or enter additional orders for the purpose of aiding in the orderly and expeditious disposition of a proceeding.

(e) Public access and reporting—Prehearing conferences shall be public unless the Administrative Law Judge determines in his or her discretion that the conference (or any part thereof) shall be closed to the public. The Administrative Law Judge shall have discretion to determine whether a prehearing conference shall be stenographically reported.

FTC Comments

The Commission is . . . amending Rule 3.21. The amended rule contains several new provisions governing prehearing case management and establishes a deadline that will require the evidentiary hearing to begin within six months of the entry of the initial prehearing order. The latter requirement will apply except where the complexity of the case or circumstances beyond the control of the parties require modification. The purpose of these changes is to reduce delay in adjudicative proceedings, to emphasize the role of the ALJ in managing and controlling the progress of litigation, and to encourage counsel to prepare for trial expeditiously. . .

The rule requires that the scheduling order establish a trial date. Unless the complexity of the cases or circumstances beyond the control of the parties necessitate more time, the date must be within six months after the order is entered. Once established, moreover, the date can only be modified for good cause.

The agency's ALJ's strongly supported this proposal. Mr. Halverson, however, vigorously opposed the requirement, and Sullivan & Cromwell commented that the ALJ should be required to set some trial date but that the six-month standard should be omitted.

Mr. Halverson opposed the six-month requirement as unnecessary because the Commission can already act with the expedition needed to protect the public interest; he noted, for example, that Rule 3.42(c) grants the ALJ "all powers necessary" to avoid delay. Mr. Halverson also commented that a six-month requirement is unfair because complaint counsel often will have had extensive pre-complaint investigation, while respondent cannot be expected to begin preparation until a complaint is issued. Furthermore, he noted that Commission cases may raise complex legal and factual issues, may require extensive third-party discovery or time-consuming survey research, or may require the location and preparation of experts and other witnesses. For these reasons, Mr. Halverson concluded, many cases cannot be brought to trial within six months.

Mr. Halverson is of course correct in observing that existing Commission rules require expedition in Part 3 matters. These other rules, however, address the issue of expedition in general terms. The changes to Rule 3.21 establish specific procedures to implement the goal and are therefore meaningful supplements to the existing rules.

The setting of a trial date, moreover, is one significant action that will promote the goal of expedition. As Mr. Halverson notes, the date will have to be set on the basis of incomplete information, and the complexity of a case may not become apparent until after the order is issued. However, the judgment that the ALJ must make in setting a trial date is little different than the judgment that a judge or magistrate must make under Rule 16 of the Federal Rules of Civil Procedure. Under Fed. R. Civ. P. 16(b), the judge or magistrate must in most cases issue a order, within 120 days after the filing of a complaint, that limits the time to complete discovery. Like the Federal Rules, moreover, Commission Rule 3.21 addresses situations in which the date proves unrealistic by providing that it can be changed for good cause.

We have also concluded that the six-month standard included in the rule should not prove unfair to respondents. The critical issue is whether the rule allows respondents adequate time to prepare their defense. The proposed rule generally allows eight or more months after the complaint to prepare a case, including a period of more than two months that may precede the scheduling conference. Past experience demonstrates that this is adequate time to prepare many cases. *See, e.g., George's Radio and Television Co., Inc.*, 94 FTC 1135, 1139 (1979) (less than 7 months between complaint and trial); *E.I. Du-Pont de Nemours & Co.*, 96 FTC 653, 655-56 (1980) (less than 8 months); *Litton Industries, Inc.*, 97 FTC 1, 10 (1981) (less than 8 months); *Cliffdale Associates, Inc.* 103 FTC 110, 125 (1983) (less than 7 months).

In the past, most Commission cases have not been brought to trial this rapidly. It is intended, as a result of these changes, that all cases that can be brought to trial within this schedule will be prepared at this pace. In any event, as noted above, the trial date can be set for more than six months after the scheduling order if the complexity of the case or circumstances beyond the control of the parties who requires. In addition, as further noted above, a previously-established trial date can be modified when, for good cause, trial preparation takes longer than anticipated. These provisions adequately protect parties who cannot realistically prepare for trial within six months.

We have concluded, finally, that a rule establishing a six-month deadline is preferable to a rule that simply directs the Administrative Law Judge to set some trial date. The comment filed by Sullivan & Cromwell argues that a six-month standard with an exception for special circumstances will create incentives for a party to seek an extended trial date. These incentives, however, will exist as long as the ALJ is required to set any trial date in the order. The remedy for this problem is not to eliminate the six-month standard, as Sullivan & Cromwell concludes, but to rely on the judge to weigh the arguments that are made and to set a later trial date only when the arguments are persuasive. Sullivan & Cromwell also comments that substantial litigation will result because unrealistic trial dates will generate motions to modify the scheduling order. When a six-month trial date is not realistic, however, the judge can set a later date at the outset. . .

§ 305.82-2 Resolving Disputes Under Federal Grant Programs (Recommendation No. 82-2).

Federal grants to governments, public service institutions and other non-profit organizations have been conspicuous instruments of Federal policy since the 1930s. During the past two decades the growth in the number of Federal grant programs, and the level of resources distributed through grants, has evidenced the expanded influence of the Federal government on the activities of these entities.

Ensuring proper conduct of Federal assistance programs has assumed increasing importance as these extraordinarily varied programs have proliferated. Federal domestic grant spending, which now exceeds $100 billion annually, promotes major social goals. Grants, and the activities they assist, often are crucial to beneficiaries whom Congress intends to aid and to recipients who carry out program goals. For instance, over one-quarter of all expenditures by state and local governments now come from Federal grants, and thousands of smaller institutions depend on these funds for their very existence.

Each of these grants represents an understanding on the part of the Federal government and the grantee that is in the nature of a contractual commitment. The number and intensity of disputes over grants have risen in recent years, following both the increased reliance on Federal grants by other institutions and a growing Federal budget stringency that has decreased the generosity of Federal funding and increased the rigor of audit review. These disputes run the gamut from those that involve nearly pure questions of Federal policy and agency discretion to those that affect substantial grantee expectations or involve particularized adverse determinations about individuals.

Disputes may arise initially over the making or withholding of a grant, the amount of funds committed, or the terms and conditions imposed. Once the grantee has undertaken the project, controversies may occur over what actions the grantee has been funded or authorized to take, the grantee's relationships with program beneficiaries, subgrantees, or subcontractors, and other incidents of ongoing project administration, including grantee compliance with the terms and conditions of the grant. Disputes may arise in the form of audit disallowances. Finally, an agency may choose to terminate or debar a grantee or refuse to provide continued funding based on the agency's belief about the adequacy of a grantee's performance of previous projects.

In prior recommendations, the Administrative Conference has called on all Federal grantmaking agencies to adopt informal procedures for hearing and resolving complaints by the public that a recipient's administration of a grant fails to meet Federal standards (Recommendations 71-9 and 74-2). While some agencies have carried out these recommendations, many still do not afford grantees or other persons affected by the operation of Federal domestic grant programs any channels for impartial consideration of their complaints. Congress has provided few directives in this area, except as to a few agencies like the Departments of Education and Labor, and actual agency practices in handling grant disputes have varied considerably.

This recommendation goes beyond the Conference's prior statements to focus on the rights that agencies should provide to grantees and applicants for grant funds. Few agencies afforded grant recipients any substantial appeal rights until the mid-1970's: some still fail to do so. In recent years, several agencies have begun to create processes to resolve some types of disputes with grantees and certain types of grant applicants. Their experience indicates that these appeal procedures, while sometimes flawed, have been useful for protecting grantees' rights and for helping agencies to avert needless and troublesome litigation, improve oversight of significant administrative problems, ensure that policies are applied fairly and consistently, and make decisions on a rational, justifiable basis.

Given the importance of these programs, the nature of the interests involved, public policy factors, and considerations of fairness enunciated in recent constitutional decisions, the Administrative Conference believes that all grantmaking agencies should maintain procedures to hear appeals regarding certain kinds of agency actions. For example, grantees generally have a special interest in debarment, termination, suspension, or certain kinds of renewal or entitlement situations. Also, disputes regarding some expenditure disallowances arising from audits, or other cost and cost rate determinations, may be crucial to a grantee, requiring payback of large sums. Because of the potential significance of these types of action, and their relative infrequency, agencies should establish appeals procedures for them. On the other hand, thousands of applications for competitive discretionary grants are denied each year, and the imposition of any broad appeal hearing requirement for this type of action could be quite burdensome to some agencies.

While the variety and complexity of Federal domestic grant programs (and grant disputes) ultimately renders uniform procedural prescriptions inappropriate, this recommendation sets forth some general considerations that agencies should find useful to guide them in assessing the adequacy of their present methods of resolving grant appeals. The Conference believes that an agency should have considerable latitude to tailor procedures to the characteristics of its programs and grantees, and in the great bulk of appeals agencies need not match the protections required in adjudications governed by the Administrative Procedure Act, 5 U.S.C. 554-557. The recommendation begins with, and centers on, the notion that informal action—including opportunities for conversations with relevent program officials and their superiors, mediation or ombudsman services, and similar devices—should form the core of the resolution process. Still, agencies should be aware that at least some disputes may arise, especially in post-award cases involving contested issues with substantial funds at stake, in which some kind of more formal agency review should be made available.

In making this recommendation, the Conference is aware that some agencies maintain appeal procedures which are more elaborate than those described below but provide equal or greater safeguards and protective measures. This recommendation is not intended to cast any doubt on the propriety of such procedures, or to assess the need therefor in light of specific programs or agency goals and concerns.

RECOMMENDATION

I. SCOPE AND INTENT OF THE RECOMMENDATIONS

The recommendations in Part II concern procedures for disputes involving domestic "grantees" and "vested applicants." A "grantee" may be a non-profit or community service organization, a unit of state or local government, a school, corporation or an individual who has executed a grant agreement or cooperative agreement with a Federal agency. A "vested applicant" is one who is entitled by statute to receive funds, provided the applicant meets certain minimal requirements; or one who applies for a noncompetitive continuation grant, and has been designated in some manner as the service deliverer for a designated area or is operating within a designated multi-year project period. Part III deals with agency-level processes for handling complaints by disappointed applicants for discretionary grant funds. The procedures recommended herein are not intended to displace existing hearing mechanisms already required by law in some programs. They apply only to grant programs carried on primarily within the United States.

II. COMPLAINTS BY GRANTEES AND VESTED APPLICANTS

A. Informal Review and Dispute Resolution Procedures

1. Each Federal grantmaking agency should provide informal procedures under which the agency may attempt to review and resolve complaints by grantees and vested applicants without resort to formal, adjudicatory procedures. The informal procedure could take several forms, including, for example, advance notice of adverse action and the reasons for the action, opportunity to meet with the Federal officials involved in the dispute, review by another or higher-level agency official, or use of an ombudsman or mediator. Attempts to resolve disputes under these informal procedures should be pursued expeditiously by the agency within a definite time frame. Notwithstanding these time limits, a complainant's invocation of more formal appeal procedures should not prevent further efforts to settle, mediate, or otherwise resolve the dispute informally.

2. The existence of informal review procedures should be made known to affected grantees and vested applicants in the manner described in paragraphs 3 and 12, below. Agencies should encourage their program and decisional officials to resolve grievances informally, and provide training to improve their abilities to do so. In undertaking such training, agencies should work with those agencies that already have begun to make use of mediation and other conciliatory approaches, such as the Departmental Grant Appeals Board in the Department of Health and Human Services, and existing groups with expertise in these methods of dispute resolution.

B. Notice of Agency Action

3. Upon issuance of an agency decision which (if not appealed) represents final agency action, each grantmaking agency should provide prompt notice of its action to the affected grantee or vested applicant. If the action is adverse to a grantee or vested applicant, the agency's notice, at a minimum, should provide a brief statement of the legal or factual basis for the action; state the nature of any sanctions to be imposed; and describe any available appeal procedures, including applicable deadlines and the name and address of the agency official to be contacted in the initial stages of an appeal.

C. Administrative Appeal Procedures

4. Each Federal grantmaking agency should provide the additional opportunity for some type of administrative appeal in at least certain kinds of grant-related disputes. This appeal may be conducted orally or in writing, depending on the nature of the dis-

pute, and may be expedited where appropriate. In determining whether an administrative appeal should be afforded and the form of any such appeal for particular classes of disputes, agencies should consider the probable impact of the adverse action on the complainant, the importance of procedural safeguards to accurate decisionmaking in each class of dispute, the probable nature and complexity of the factual and legal issues, the financial and administrative burden that would be imposed upon the agency, the need for a perception of the government's fairness in dealing with grantees and vested applicants, and the usefulness of appeal procedures to give feedback on administrative problems.

5. In light of the factors described in paragraph 4, each Federal grantmaking agency should provide the opportunity for some kind of administrative appeal with regard to adverse actions involving:

a. The performance of an existing grant, including disputes involving debarment, termination, suspension, voiding of a grant agreement, cost disallowances, denials of cost authorizations, and cost rate determinations;

b. The denial of funding to applicants for entitlement grants, including disputes involving the applicant's eligibility, amount of funding to be received, and application of award criteria or pre-established review procedures; and

c. The denial of applications for noncompetitive continuation awards where the denial is for failure to comply with the terms of a previous award.

6. Where an opportunity for an administrative appeal is afforded, the agency should take into account the factors set forth in paragraph 4 and select from among the following forms of proceedings to provide the one most appropriate to the particular case:

a. Decision based on written submissions only;

b. Decision based on oral presentations;

c. Decision on written submissions plus an informal conference or oral presentation; or

d. Full evidentiary hearing.

Where a hearing or conference is useful to resolve certain issues, the agency may limit the hearing to those issues and treat remaining questions less formally. In addition, the agency should provide some form of discretionary expedited appeal process for disputes. In such proceedings, the agency may, for example, shorten time deadlines, curtail record requirements, or simplify procedures for oral or written presentations.

7. At a minimum, these administrative appeal procedures should afford grantees and vested applicants the following:

a. Written notice of the adverse decision (See paragraphs 3 and 12);

b. An impartial decisionmaker (for instance, a grant appeals board member, a high level agency official, a person from outside the agency, an administrative law judge, or certain other agency personnel from outside the program office) with authority to conduct the proceedings in a timely and orderly fashion;

c. Opportunity for the agency, complainant, and any other parties to the appeal promptly to obtain information from each other, and to present and rebut significant evidence and arguments;

d. Development of a record sufficient to reflect accurately all significant factual submissions to the decisionmaker and provide a basis for a fair decision; and

e. Prompt issuance of a written decision stating briefly the underlying factual and legal basis.

8. Each Federal grantmaking agency should determine in advance, and specify by rule or order, the scope of the authority delegated to the decisionmaker in administrative appeals. For example, agencies should specify in advance whether the decisionmaker has the authority to review the validity of agency regulations or the consistency of agency actions with governing statutes.

9. Agencies should accord finality to the appeal decision, unless further review is conducted promptly pursuant to narrowly drawn exceptions and in accordance with preestablished procedures, criteria, and standards of review. If the decisionmaker is delegat-

ed, or asserts, authority to review the validity of agency regulations, the agency head should retain an option for prompt final review of the decision in accordance with applicable procedures.

10. Once these administrative appeal procedures are invoked, the decisionmaker should discourage all ex parte communications on the appeal unless the parties consent to such communications. Any ex parte communications that do occur should be disclosed promptly, and placed in the appeal record.

11. Agencies should encourage prompt decision of appeals by creating time limits or other guidelines for processing grant disputes, and should pay particular attention to resolving appeals over decisions regarding renewal and continuation grants in a timely manner. These timetables might be fixed generically or in accordance with the complexity of particular cases. Decisionmakers' compliance should be monitored by the agency pursuant to a regular caseload management system.

D. Public Notice

12. Grantmaking agencies should give advance notice and afford an opportunity for public comment in developing informal review and administrative appeal procedures. Agencies should ensure that available procedures are made known to grantees and vested applicants. Notice of such procedures should be published in the FEDERAL REGISTER, codified in the Code of Federal Regulations, and included in grant agreements and other appropriate documents, in addition to the individual notice described in paragraph 3.

13. Agencies should collect in a central location, and index, those written decisions made in administrative appeals. These decisions should be made available to the public except to the extent that their disclosure is prohibited by law. Whenever a grantee or vested applicant cites a previous written decision as a precedent for the agency to follow in its case, the agency should either do so, distinguish the two cases, or explain its reasons for not following the prior decision.

III. COMPLAINTS BY DISCRETIONARY GRANT APPLICANTS

A. Informal Review Procedures

The Conference previously has called on agencies to develop criteria for judging discretionary grant applications and to adopt at least informal complaint mechanisms to ensure compliance with these criteria and other federal standards. (See Recommendations 71-9 and 74-2.) The Conference reiterates its belief that these procedures can benefit agency performance.

B. Public Notice

Each Federal grantmaking agency should ensure that available informal review procedures and administrative appeal procedures are made known to grant applicants. Notice of such procedures should be published in the FEDERAL REGISTER, codified in the Code of Federal Regulations, and included in application materials and other appropriate documents. (See also Recommendations 71-4 and 71-9.)

IV. IMPLEMENTATION OF RECOMMENDATION

Each Federal grantmaking agency should, within one year of the adoption of this recommendation, report in writing to the Administrative Conference the steps the agency intends to take, consistent with the above guidelines, to improve its dispute resolution process.

[47 FR 30704, July 15, 1982]

§ 305.84–4 Negotiated Cleanup of Hazardous Waste Sites Under CERCLA (Recommendation No. 84–4).

By enacting the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) in 1980, Congress undertook to provide a Federal solution for the problem of abandoned and inactive hazardous waste disposal sites. Approximately 2,000 sites will require action, at a cost of tens of billions of dollars. CERCLA created a $1.6 billion revolving "Superfund" for direct Federal action to clean up these sites and respond to hazardous waste emergencies. The Act supplements this public works authority with provisions for negotiating cleanups by "potentially responsible parties"—site owners and operators and users of sites such as transporters and waste generators. It also empowers the Federal government to sue such parties for the cost of cleanups paid for out of the Superfund and, if waste disposal may present an "imminent and substantial endangerment," to sue for orders directing responsible parties to clean up sites themselves. The Act is administered by the Environmental Protection Agency (EPA).

By early 1984, although EPA had responded to hazardous waste emergencies at many sites, only a handful of sites listed on a statutory national priority list by the agency had been completely cleaned up by the Federal government. A few more sites had been cleaned up by private parties. The causes of delay were varied: uncertainty about the extent of the problem and the efficacy of technical remedies; start-up problems inherent in a new program; and a two-year long effort to negotiate cleanups so that no Superfund revenues would have to be spent. By mid-1983, the strategy of conserving the Superfund had fallen apart amidst a major leadership crisis within the EPA. In a policy reversal, Superfund expenditures for cleaning up sites then took priority over other means available under the statute for effecting cleanups.

The current agency approach to CERCLA emphasizes cleanups paid for out of the Superfund coupled with actions to recover the expenditures but also relies to a limited extent on negotiated cleanups and on lawsuits to compel responsible parties to act under CERCLA's imminent endangerment provision. This strategy has resulted in a CERCLA implementation effort that is slow and expensive.

Congress, the EPA, responsible parties, and other critics have suggested several means of speeding up and economizing on site cleanups. These include enlarging the Superfund, setting program deadlines, expanding the EPA program offices, empowering citizens to sue, and encouraging voluntary cleanup by industry. Although enlarging the Fund, providing more staff, and setting program deadlines would tend to accelerate the CERCLA effort, the Administrative Conference believes that a properly designed site cleanup negotiation process, through which responsible parties or third parties would agree to act directly to cleanup sites, would also hasten cleanup while reducing its expense by tapping the technical and financial resources of the private sector. Involvement of the Federal government and affected citizens in this process would ensure adequate protection of public health and the environment.

Although current EPA policy permits the negotiation of cleanups, the agency puts too little stress on negotiations and has adopted a series of procedural and substantive requirements that unnecessarily constrict the number of negotiated cleanup agreements that the agency might beneficially conclude. The Conference recognizes, of course, that successful negotiations can only occur when private parties as well as the Federal government are willing to respond to the problem of hazardous waste cleanup in good faith. The Conference intends no criticism of aggressive EPA enforcement efforts where responsible parties refuse to cooperate.

In this recommendation the Administrative Conference suggests a series of steps that the EPA might take to encourage and facilitate greater reliance on negotiated private party cleanups, in those situations where negotiations have a realistic chance of success.

Recommendation

1. The Environmental Protection Agency (EPA) should emphasize the negotiation of voluntary cleanups at hazardous waste dump sites. The negotiation process for any site should include, at an appropriate time and in an appropriate manner, the key interests, such as Federal, State and local governments, parties potentially responsible for cleanup (including site users, site owners and operators, and waste transporters), and local citizens. Whenever possible, efforts to negotiate a cleanup agreement should begin well before the commencement of litigation concerning a site. To increase the likelihood that negotiations will succeed, the Administrator and other leading EPA officials, both at headquarters and in the regional offices, should support the negotiation process, follow its implementation, and be available to explain specific negotiated agreements before congressional oversight committees if necessary.

2. Citizens living in the vicinity of or otherwise directly affected by a site have a substantial interest in some issues related to the cleanup process—for example, medical diagnostic testing, relocation of public service facilities, measures to isolate the site, and the overall adequacy of the cleanup effort. Their interest in other aspects of the process, such as the allocation of costs among potentially responsible parties (or between potentially responsible parties and the government) is more problematic. EPA should consider means beyond complete reliance on local political institutions for involving these citizens, including the negotiation of collateral arrangements, participation of citizens' groups in negotiations over the type and scope of the remedy, and the like. Even if not participants, local citizens ordinarily should be permitted to observe those aspects of the negotiations that concern them.

3. Many negotiations can be conducted by EPA without outside assistance. In other cases, where outside assistance is desirable, EPA should encourage efforts by independent mediating organizations or individuals to convene negotiations. This can be accomplished by asking such a convenor at an early stage—no later than the commencement of "remedial investigations and feasibility studies" (a statutory cleanup stage)—to determine whether conditions are favorable for negotiations at a site. Favorable conditions include: Issues that are ripe for decision; absence of fundamental conflict about values among those with a stake in the outcome; adequate representation and organization of key interests; opportunity for mutual gain for those with a stake; a balance of power among participants; willingness to bargain in good faith and share information; and willingness of units of government to participate as equal parties. Where negotiation appears feasible, the convenor should attempt to organize a site negotiation group from among the parties with a stake in the site cleanup. If an initial meeting of the parties is successful, the participants should consider retaining the convenor or another person to serve as mediator for the duration of negotiations. EPA should consider using Superfund resources to support an entity, such as a non-profit corporation or another agency, that would undertake this initial convening effort and provide mediation services if the parties desired them. Alternatively, EPA should consider providing these services through personal service contracts with skilled mediators.

4. In order to take advantage of private funds and expertise while they remain available, EPA should encourage and participate in negotiations for cleanup of sites where there is a high likelihood of successful negotiations, even if they have not yet been allocated Federal funding for remedial investigations or been added to the Nation-

al Priority List, unless such negotiations will distort the agency's priorities by diverting substantial agency resources or causing undue delay.

5. EPA should avoid wasting agency resources on unproductive negotiations by establishing, with the concurrence of other negotiating parties, reasonable deadlines for the conclusion of negotiations.

6. Successful negotiation requires that participation by all interests by through persons who, if not principals, have the confidence of, and easy access to, principals with the authority to make binding commitments. For EPA, the negotiators or persons readily accessible to the negotiators should have explicit, broad delegated authority to commit the agency to a negotiated outcome. To the extent that peer review and approval of agreements within the agency are nonetheless required, EPA should provide expedited means for obtaining them. One method of achieving this end would be for EPA headquarters to consolidate review of negotiated cleanups in a single panel of key officials.

7. The final agreement should take the form of an administrative consent order under section 106 of CERCLA or a judicial consent decree. Like other parties to the agreement, EPA should bind itself to undertake appropriate actions and follow agreed-upon schedules.

8. Negotiations undertaken in the context of litigation require procedures and standards different from the procedures and standards applicable to negotiations occurring before a matter reaches litigation. EPA should acknowledge that existing agency guidance memoranda on "case settlement policy" are appropriate for use only in litigation situations; to implement the proposed negotiation process, the agency should prepare new guidance memoranda that bring more appropriate factors to bear on prelitigation negotiations.

9. The Conference recognizes EPA's need to maintain a strong litigation posture in CERCLA cases in order to strengthen its ability to negotiate agreements in the public interest. However, the Conference also urges the agency to consider the possible advantages of greater flexibility in situations where cleanup arrangements are being negotiated rather than litigated. For example, in some cases it might be desirable for EPA to begin to negotiate even if 80% of cleanup costs has not been offered or to agree with the parties about the amounts of their individual responsibilities to pay cleanup costs even if the total responsibility adds up to less than 100 percent of cleanup costs (allocating Superfund resources to pay for the rest), as an incentive for cooperating parties to join promptly in an agreement. The intransigence of a few responsible parties should not be permitted to block agreement with others prepared to accept reasonable shares of responsibility; moreover, such partial agreements may free agency resources to pursue the intransigent parties.

10. Although the Conference believes that its recommendation can be implemented without additional legislation, it acknowledges that the effectiveness of expanded reliance on negotiated cleanups would depend upon the degree of support or opposition from relevant congressional committees. If EPA undertakes efforts to clean up dump sites through a negotiation process like that described in this recommendation, congressional committees should support and encourage these efforts, recognizing that negotiated solutions inevitably involve compromises.

11. To promote achievement of its site cleanup management objectives, EPA should publish statements of its CERCLA policies, such as conditions for undertaking voluntary cleanup negotiations, procedures for public involvement in site cleanup decisions, and site study criteria, in the FEDERAL REGISTER and allow for public comment.

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Columns

NIDR's State Office of Mediation Experiment

Lawrence E. Susskind

The National Institute of Dispute Resolution (NIDR) is currently providing multi-year matching grants to five experimental state offices of mediation. At a recent meeting in Washington, D.C., the directors of these offices and key state government officials exchanged ideas and reviewed recent activities and future plans. The session was extremely encouraging—thus far, it looks as if the state office idea is working.

When NIDR agreed to give grants (ranging from $10,000 to $50,000 a year) to New Jersey, Massachusetts, Wisconsin, Hawaii, and Minnesota, it had several objectives. First, there was a desire to demonstrate that dispute resolution techniques could help state governments deal more effectively with disputes that currently clog the courts and bog down administrative and legislative efforts. Until NIDR announced its program of state incentive grants, there had been surprisingly few attempts at the state level to use mediation, arbitration, and other alternatives as a means of resolving regulatory, permitting, rate setting, budgeting, municipal annexation, facility siting, and other government policy disputes. While the few successful experiments (such as the Negotiated Investment Strategy experiments sponsored by the Kettering Foundation and the State of Virginia's annexation mediation program) attracted a great deal of attention, they did not lead to additional demonstrations.

Second, NIDR hoped to create a market for the services of private dispute resolution practitioners. A great many practitioners have had problems establishing a regular flow of cases and overcoming financial obstacles generated by the unequal ability of disputing parties to pay for the services of a neutral. A third NIDR objective was to seed an array of efforts to institutionalize dispute resolution along whatever lines make sense in each state. Unless ad hoc efforts eventually lead to institutionalization, the dispute resolution movement will die.

Five Different Models

Each state office has a different administrative structure, and each has focused on different projects and activities. In New Jersey, the Center for Public Dispute Resolution (headed by James McGuire) is located in the Department of the Public Advocate's Division of Citizen Complaints and Dispute Settlement. A 13-member Advisory Board guides the efforts of two attorney/

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mediators and a director of training. The Center has served as a special master (appointed by the state court) in three complex public disputes. Staff has also worked with the state Supreme Court to establish a network of dispute resolution centers throughout New Jersey, and initiated a policy dialogue (involving public officials, citizen action groups, and industry leaders) on the siting of solid waste disposal facilities. The Center publishes a periodic newsletter, and has compiled a directory of "third party professionals" in the state.

The Massachusetts Mediation Service (directed by David O'Connor) is under the jurisdiction of the Executive Office for Administration and Finance. A 12-member Board provides advice to a two-member staff. The MMS has already mediated statewide disputes concerning hazardous waste disposal, the cleanup of a Superfund site, and long-term health care insurance regulation. The state's Appellate Court recently appointed MMS as the coordinating agency for implementation of a long-delayed and often-litigated prison construction project in Boston. The Mediation Service has devoted a substantial portion of its energies to behind-the-scenes consultations with state agencies interested in but still wary of dispute resolution techniques. In addition, MMS played a key role in securing legislative approval of a new state law that guarantees confidentiality privileges to mediators.

The Minnesota State Planning Agency serves as the administrative home for that state's Office of Dispute Resolution. An Ad Hoc Advisory Board oversees the efforts of Director Roger Williams and a small staff. The Office has helped develop and implement a farmer-lender mediation program within the Department of Agriculture Extension Program. The Office has also sponsored a statewide conference on mediation and helped to train state officials who want additional mediation skills. Current activities include the compilation of a roster of mediation professionals.

The Hawaii Program on Alternative Dispute Resolution (directed by Peter Adler) is located in the Office of the Administrative Director of the Courts, directly under Chief Justice Herman Lum. The Hawaii Program has helped to implement a court-ordered arbitration plan in the civil courts and encouraged mediation in public resource allocation disputes. The Program has also sponsored the introduction of "ADR" legislation and developed a statewide ADR directory.

Wisconsin's approach differs from the other states with NIDR-funded pilot projects. There, rather than creating a separate office or hiring staff, Howard Bellman, the state's Secretary of Labor, Industry, and Human Relations, chairs an informal screening panel (including some of the Governor's key policy advisers) that determines whether dispute resolution techniques might usefully be applied in certain controversies.

In 1985, through Bellman's intervention, two major statewide disputes between the Department of Natural Resources and Indian tribes over fish and game regulation were mediated. In addition, Bellman has participated in a statewide study of Alternative Dispute Resolution and worked to implement a court-sponsored arbitration project.

Lessons Learned

In choosing among the applications submitted by interested states, NIDR sought guarantees of official support (especially matching funds), indications of a readiness to move quickly, and a multi-issue focus. From what the five states have accomplished thus far, it appears that NIDR chose wisely. It is no small accomplishment to win political support for such experimental efforts, gain approval for matching allocations, select senior staff, and achieve actual case results in only a year or two. On the other hand, it is too soon to tell whether the states will agree to accept full financial responsibility for long-term support once the NIDR grants run out.

As other states contemplate creating their own state offices, the problems encountered by the first five states should be given careful consideration.

The most vexing, but not surprising, problem has been resistance to the idea from inside the executive branch and particularly from administrative agencies concerned about their authority. A number of key officials in each state have been quite antagonistic to the idea of "turning over" highly visible policy, siting, or other kinds of disputes to "outsiders." They tend to view the entry of a mediator as an admission of failure on their part. In their view, it is their responsibility to resolve disputes (using traditional political means).

Of course, most mistakenly assume that mediation is the same as binding arbitration, and that the disputants, including the chief executive, will be forced to "give up control" if dispute resolution procedures are employed. Only with great care and persistence have the heads of the five state offices (and their advisory boards) been able to convince the doomsayers that the use of formal dispute resolution mechanisms involves neither an admission of failure nor a loss of statutory authority.

A second difficulty involves the identification of acceptable neutrals to serve as mediators or facilitators. The notion of prescreening in-state professionals for the purpose of creating a roster has sometimes proven to be very difficult. Prescreening turns out to be a form of de facto certification, and none of the state offices wants to take on that role.

On the other hand, the state office directors agree that they must be ready with appropriate suggestions when the courts ask for special master nominees or regulatory agencies want a list of possible mediators. One important premise in all five states is that the offices will not serve as mediators in all or even most of the cases referred to them. Instead, the emphasis is on matching disputants with appropriate dispute resolvers, thereby, ensuring a steady flow of cases for private practitioners. The matching process, however, has not been easy. Ultimately, the parties themselves must select neutrals; the state offices, while prepared to make suggestions, are working to avoid implicit certification.

The funding problem persists. The NIDR grants and state matching funds have been used in four of the states to cover the cost of staffing and running an office. Each state hopes to create a "kitty" or a "revolving fund" that can be used to cover the costs associated with specific mediation efforts. Ideally, at the end of each mediation effort, the parties would pay what they could into a revolving fund to cover the cost of future mediation efforts. This way, an unequal ability to pay would not be seen as influencing the mediation effort in which the parties were involved.

Unfortunately, the state offices have not been in a position to "charge" their clients full cost for the services provided. That's not the way to get someone to try something new, particularly when they have worries and doubts about it. In addition, it is difficult for the state offices to explain to local clients why they should pay a fee for a government service.

Finally, the issue of the rate at which mediators should be paid has been the cause for some concern. Several of the states have tried to set a standard fee (ranging from $350 to $500 a day). This has eliminated from the mediator pools some of the most experienced professionals, whose rates are often much higher.

While the problems of selecting and matching neutrals, long-term financing of the services provided by the state offices, and resistance from inside state government have slowed the process of institutionalization, several other factors have helped create positive outcomes.

One such factor is the interest shown by the state judiciaries. The state offices were initially aimed at dealing with disputes under the auspices of the executive branch—particularly the administrative agencies. The state courts, though, have shown enormous initiative in identifying and adopting alternative dispute resolution techniques and strategies. New Jersey and Hawaii, in particular, have keyed most of their state office efforts to cases referred by the judiciary.

A second factor in the success of several of the state offices has been the realization that mediation and other forms of dispute resolution are best institutionalized through an almost invisible, behind-the-scenes, set of interactions with policymakers and elected officials. When public officials are able to announce a winning solution or project, thereby getting the credit for the success of such efforts, they are more inclined to try mediation a second time.

The state office directors have all opted for the behind-the-scenes approach, and have spent a great deal of time consulting with state officials who want advice on how best to handle difficult disputes. This approach has helped to build good working relationships which, in turn, have enhanced the reputation of the mediation offices within state government. While the public in each of the five states may have almost no inkling of what has been accomplished thus far, the prospects for institutionalziation have been boosted by this strategy.

The state offices have tried to build public awareness and acceptance of dispute resolution through training sessions and conferences. While these activities have sapped the energy of office staff, they have paid off in referrals and requests for assistance. All five state offices have made a commitment to continue their training activities and other forms of public education (like newsletters or community seminars).

The Future

It is still too soon to predict the final results of the first five experiments with state offices of mediation. One forecast discussed at the NIDR meeting is that "the fad will die out" in two to three years when the states refuse to pick up the costs involved in sustaining the offices that have been created. A second prediction is that the first few offices will continue with modest state funding, but that will be it.

A third possibility is that as many as ten more states will adopt dispute resolution programs over the next few years—whether by statute or informally—with or without further NIDR grants. California, for instance, is currently considering legislation that would create an office to advise local governments on how to proceed with mediation when disputes arise. The California office, headquartered in the lieutenent governor's office, would be funded with a $100,000 loan from the state treasury.

The final, most optimistic forecast is that many states will enact dispute resolution procedures that "add a mediation step" to a host of policymaking and resource allocation processes, and that the state courts will create a growing demand for skilled dispute resolution practitioners.

NIDR, the Kettering Foundation, the

Program on Negotiation at Harvard Law School, and the new Center for Negotiation and Conflict Resolution at Rutgers University have all agreed to provide ongoing assistance to not only the first five state offices but to other states that want to initiate similar efforts. In addition to California, officials in New Hampshire, Virginia, Ohio, Florida, and Maine have indicated interest in the state office concept. Within the next year or two, there will be enough experience to begin a formal evaluation of NIDR's State Office experiment.

4. FORMS AND MODEL ADR PROCEDURES

A. General

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Alternatives
to the High Cost of Litigation

Center for Public Resources (CPR) New York May 1985 Vol. 3 No. 5

Model Mini-Trial Agreement for Business Disputes

Purposes

The informal procedure known as a mini-trial, consisting of an adversarial "information exchange," followed by management negotiations, has become a highly successful form of business dispute resolution. Set forth below is a model agreement for a mini-trial to resolve a business dispute.

The success of mini-trials has been due in large part to the voluntary nature and flexibility of the process and to the cooperation, flexibility and creativity of disputants' counsel in developing procedures best suited for their particular situations. The Center for Public Resources (CPR) encourages parties to modify this model agreement, or to draw up their own agreement, which, for example, may provide for a mini-trial with or without a Neutral Advisor or may alter the role of the Neutral Advisor.

The mini-trial can be used in a variety of circumstances. Parties to an existing dispute can use this model agreement, whether or not the dispute is in litigation. The model agreement can be adopted for disputes between U.S. companies; for disputes involving foreign companies; and, with minor modifications, for disputes between a government entity and a private company. The model agreement should facilitate the drafting of commercial agreement clauses providing for dispute resolution by mini-trial, by enabling the draftsman to incorporate the model agreement by reference.

The model agreement is not self-executing, but is to be invoked through execution of an "initiating agreement," as described below. A party may withdraw from the process at any time before its conclusion.

A sample schedule and a commentary follow the model agreement. The schedule is illustrative of the time typically required for the various phases of the proceeding.

CPR has established the CPR Judicial Panel, consisting of eminent former judges, legal academics and other leaders of the bar who may assist in structuring a mini-trial and may serve as Neutral Advisor in a mini-trial. In conjunction with its Judicial Panel services, CPR is available, at the request of a party to a business dispute, to interest the other party or parties in entering into a mini-trial. A brochure listing the members of the Judicial Panel and describing services they may perform is available.

CPR has considerable expertise in the conduct of mini-trials and has produced a Mini-Trial Workbook, which includes case histories and relevant forms. CPR also has a clearinghouse of information and literature on alternative dispute resolution.

Model Agreement

1. Institution of Mini-Trial Proceeding

1.1 Parties to a dispute may commence a mini-trial proceeding by entering into a written agreement (the "initiating agreement") to conduct a mini-trial. The initiating agreement shall describe the matter in dispute, and shall state either that the parties agree to follow this model agreement, as modified by the initiating agreement, or that the parties agree to other procedures set forth or identified in the initiating agreement. A copy of the initiating agreement will be filed with the Center for Public Resources, 680 Fifth Avenue, New York, N.Y. 10019.

1.2. Various time periods referred to in this model agreement are measured from the date of the initiating agreement, which hereafter is called the Commencement Date.

2. Mini-Trial Panel

2.1. The mini-trial panel shall consist of a Neutral Advisor and one member of management from each party. Each such member shall have appropriate authority to negotiate a settlement on behalf of the party he or she represents.

2.2. The parties shall attempt to select a Neutral Advisor who is mutually acceptable to them, and who may be, but need not be, a member of the CPR Judicial Panel. The functions of the Neutral Advisor are those stated in this agreement.

2.3. If the parties have not agreed on a Neutral Advisor within 15 days from the Commencement Date, any party may request CPR to nominate candidates. Within ten days of receiving such a request, CPR shall submit to the Parties the names of not fewer than five nominees, together with a brief statement of each nominee's qualifications and the per diem or hourly rates charged by such nominee. Each party may strike from the list the names of all persons who are unacceptable to it and number the remaining names to indicate an order of preference. Each party shall mail the list to CPR within seven days of having received it. CPR will designate the Neutral Advisor from the panel members acceptable to all parties, in accordance with the designated order of mutual preference. if a party does not return the list of nominees within seven days, CPR will assume that all of the nominees are acceptable to that party. If no nominee is acceptable to all parties, CPR will schedule a meeting with the parties to agree on a Neutral Advisor.

2.4. Each party shall promptly disclose to the other party or parties any circumstances known to it which would cause reasonable doubt regarding the impartiality of an individual under consideration or appointed as a Neutral Advisor. Any such individual shall promptly disclose any such circumstances to the parties. If any such circumstances have been disclosed, the individual shall not serve as Neutral Advisor, unless all parties agree.

2.5. Prior to the mini-trial information exchange described in Section 6 hereof, and unless all parties otherwise agree, no party, or anyone acting on its behalf, shall unilaterally communicate with the Neutral Advisor, except as specifically provided for herein.

2.6. The parties will jontly and promptly send to the Neutral Advisor such materials as they may agree upon for the purpose of familiarizing him or her with the facts and issues in the dispute.

2.7. The parties may jointly seek the advice and asistance of the Neutral Advisor or of CPR in interpreting this agreement and on procedural matters. The parties shall comply promptly with all reasonable requests by the Neutral Advisor for documents or other information relevant to the dispute.

2.8. The Neutral Advisor's per diem or hourly charge will be established at the time of his or her appointment. Unless the parties otherwise agree, (a) the fees and expenses of the Neutral Advisor, as well as any other expenses of the mini-trial, will be borne equally by the parties; and (b) each party shall bear its own costs of the proceedings.

2.9. On or before thirty days from the Commencement Date, by written notice to each other party and the Neutral Advisor, each party shall select a member of its management to serve on the Panel. If a party later desires to designate a different member of management, it shall promptly notify each other party and the Neutral Advisor of the substitution.

3. Court Proceedings

3.1. If on the Commencement Date no litigation is pending between the parties with respect to the subject matter of the mini-trial, no party shall commence such litigation until the mini-trial proceedings have terminated in accordance with Section 9 hereof. Execution of the initiating agreement shall toll all applicable statutes of limitation until the mini-trial proceedings have terminated. The parties will take such other action, if any, required to effectuate such tolling.

3.2 If on the Commencement Date litigation is pending between the parties with respect to the subject matter of the mini-trial, the parties will promptly (a) present a joint motion to the Court to request a stay of all proceedings pending conclusion of the mini-trial proceedings; and (b) request the Court to enter an order protecting the confidentiality of the mini-trial and barring any collateral use by the parties of any aspect of the mini-trial in any pending or future litigation; provided, however, that the grant of such stay and protective order shall not be a condition to the contination of the mini-trial proceeding.

4. Discovery

4.1. If one or more of the parties have a substantial need for discovery in order to prepare for the mini-trial information exchange, the parties shall attempt in good faith to agree on a minimum plan for strictly necessary, expeditious discovery. Should they fail to reach agreement, any party may request a joint meeting with the Neutral Advisor to explain points of agreement and disagreement. The Neutral Advisor shall promptly make a recommendation as to the scope of discovery and time allowed therefor.

4.2. Should the mini-trial not result in a settlement of the dispute, discovery taken in preparation for the mini-trial information exchange may be used in any pending or future judicial proceeding between the parties relating to the dispute. Such discovery shall not restrict a party's ability to take additional discovery at a later date in any such proceeding, including additional depositions from persons deposed.

5. Briefs and Exhibits

5.1. Before the mini-trial information exchange, the parties shall exchange, and submit to the Neutral Advisor, briefs, as well as all documents or other exhibits on which the parties intend to rely during the mini-trial information exchange. The parties shall agree upon the length of such briefs, and on the date on which such briefs, documents and other exhibits are to be exchanged.

6. Conduct of Mini-Trial Information Exchange

6.1. The mini-trial information exchange shall be held before the mini-trial panel at a place agreed to by the parties, on a date agreed to by the parties and the Neutral Advisor.

6.2. During the information exchange each party shall make a presentation of its best case, and each party shall be entitled to a rebuttal. The order and permissible length of presentations and rebuttals shall be determined by agreement between the parties.

6.3. The presentations and rebuttals of each party may be made in any form, and by any individuals, as desired by such party. presentations by fact witnessess and expert witnesses shall be permitted.

6.4. No rules of evidence, including rules of relevance, will apply at the information exchange, except that the rules pertaining to privileged communications and attorney work product will apply.

6.5. The Neutral Advisor will moderate the information exchange.

6.6. Presentations may not be interrupted, except that during each party's presentation, and following such presentation, any member of the Panel may ask clarifying questions of counsel or other persons appearing on that party's behalf. No member of the panel may limit the scope or substance of a party's presentation. Each party may ask questions of opposing counsel and witnesses during scheduled open question and answer exchanges, and during that party's rebuttal time if the parties so agreed.

6.7. The information exchange shall not be recorded by any means. However, subject to Section 8, persons attending the information exchange my take notes of the proceedings.

6.8. In addition to counsel, each management representative may have advisors in attendance at the information exchange, provided that each other party and the Neutral Advisor shall have been notified of the identity of such advisors at least ten days before commencement of the information exchange.

7. Negotiations Between Management Representatives

7.1. At the conclusion of the information exchange, the management representatives shall meet, by themselves, and shall attempt to agree on a resolution of the dispute. By agreement, other members of their teams may be invited to participate in the meetings.

7.2. At the request of any management representative, the Neutral Advisor will render an oral opinion as to the likely outcome at trial of each issue raised during the information exchange. Following that opinion, the management representatives will again attempt to resolve the dispute. If all management representatives agree to request a written opinion on such matters, the Neutral Advisor shall render such a written opinion within 14 days. Following issuance of any such written opinion, the management representatives will again attempt to resolve the dispute.

8. Confidentiality

8.1. The entire process is a compromise negotiation. All offers, promises, conduct and statements, whether oral or written, made in the course of the mini-trial proceeding by any of the parties, their agents, employees, experts and attorneys, and by the Neutral Advisor, who is the parties' joint counsel (or agent if not an attorney) for the purpose of these compromise negotiations, are confidential. Such offers, promises, conduct and statements are subject to FRE 408 and are inadmissible and not discoverable for any purpose, including impeachment, in litigation between the parties to the mini-trial or other litigation. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its presentation or use at the mini-trial.

8.2. The Neutral Advisor will be disqualified as a trial witness, consultant, or expert for any party, and his or her oral and written opinions will be inadmissible for all purposes in this or any other dispute involving the parties hereto.

9. Termination of Proceeding

9.1. The mini-trial proceedings shall be deemed terminated if and when (a) the parties have not executed a written settlement of their dispute on or before the forty-fifth day following conclusion of the mini-trial information exchange (which deadline may be extended by mutual agreement of the parties), or (b) any party serves on each other party and on the Neutral Advisor a notice of withdrawal from the mini-trial proceedings.

Sample Mini-Trial Schedule

Before the Mini-Trial Information Exchange

Commencement Date (CD: Parties sign initiating agreement and file same with CPR (para. 1.1.).

CD + 10: Parties agree on Neutral Advisor (NA) (para. 2.2.).

CD + 10: If litigation is pending, parties' attorneys move to stay proceedings (para. 3.2.).

CD + 15: Parties' attorneys agree on discovery plan, including a 60-day discovery schedule (para. 4.1.).

CD + 20: Parties' attorneys send material on dispute to NA (para. 2.6.).

CD + 30: Parties' attorneys agree on place and date for mini-trial and on length of presentations, rebuttals, and responses (para. 6.1.–6.2.).

CD + 30: Parties determine form of briefs and date for submission of briefs and exhibits (para. 5.1.).

CD + 30: Parties give notice of selection of management members of panel (para. 2.9.).

CD + 75: Discovery is completed.

CD + 90: Parties exchange briefs and exhibits (para. 5.1.).

CD + 95: Parties give notice of advisors who will attend information exchange (para. 6.8.).

CD + 105: Information Exchange begins (para. 6.2.).

At the Mini-Trial Information Exchange

Day 1:

9:00–12:00	Plaintiff's case-in-chief
1:00– 2:00	Defendant's rebuttal
2:00– 3:00	Open Question and Answer exchange

Day 2

9:00–12:00	Defendant's case-in-chief
1:00– 2:00	Plaintiff's rebuttal
2:00– 3:00	Open Question and Answer exchange

After the Mini-Trial Information Exchange

Day 2:

3:00–5:00 Negotiations

Day 3–21:

Reserved for negotiations (para. 7.1.).

Day 17:

NA submits written opinion, if requested (para. 7.2.).

CPR Commentary on Model Mini-Trial Agreement

Counsel drafting a commercial agreement may incorporate the model mini-trial agreement by reference. The following language is suggested:

> "The parties intend that they will attempt in good faith to resolve any controversy or claim arising out of or relating to this agreement by a mini-trial in accordance with the CPR Model Mini-Trial Agreement."

CPR does not consider the above clause as creating an enforceable right or obligation. The model agreement is not designed to be self-executing. CPR considers it an essential characteristic of the mini-trial that it be entered into voluntarily by parties which wish to resolve a dispute in a private, rapid, cost-effective manner through an informal, collaborative process which will enable them to fashion their own solution. A mini-trial is not likely to succeed without the genuine motivation of the parties to make it succeed.

Between reputable companies even an unenforceable statement of intent should carry considerable weight, and if a dispute should arise such a statement would substantially increase the likelihood that the parties would make a serious effort to arrive at a compromise through the mini-trial process, rather than seeking an adjudicative solution.

The commercial agreement also could provide that if a dispute arises, negotiations between executives would be the first step in attempting resolution; a mini-trial the second step, if such negotiations should not succeed.

The role of CPR in the procedure is very limited. CPR believes that the mini-trial should be a truly private process which succeeds through cooperation between the parties and between counsel.

CPR may make reasonable time charges for such services as it is asked to perform.

The paragraph numbers below refer to paragraphs in the model agreement.

1.1 CPR will not charge a fee for filing of the initiating agreement.

2.1 The model agreement provides for the appointment of a Neutral Advisor. CPR believes that a highly qualified Neutral Advisor can substantially enhance the prospects for success; however, successful mini-trials also have been held without a Neutral Advisor. The parties have the option of dispensing with a Neutral Advisor.

2.2 In order for the Neutral Advisor's views to carry weight, the Neutral Advisor must be a person in whose impartiality and judgment all parties have full confidence. It is preferable that the Neutral Advisor be selected by mutual agreement, rather than through the nomination procedure set forth in paragraph 2.3.

2.9 The negotiations following the information exchange are more likely to succeed if the negotiators are objective and do not feel a need to defend past actions. It is preferable that the management representatives shall not have participated directly or actively in the events underlying the dispute. As a rule, the more senior the management representatives, the greater the range of options for a constructive solution they will perceive.

About These Rules

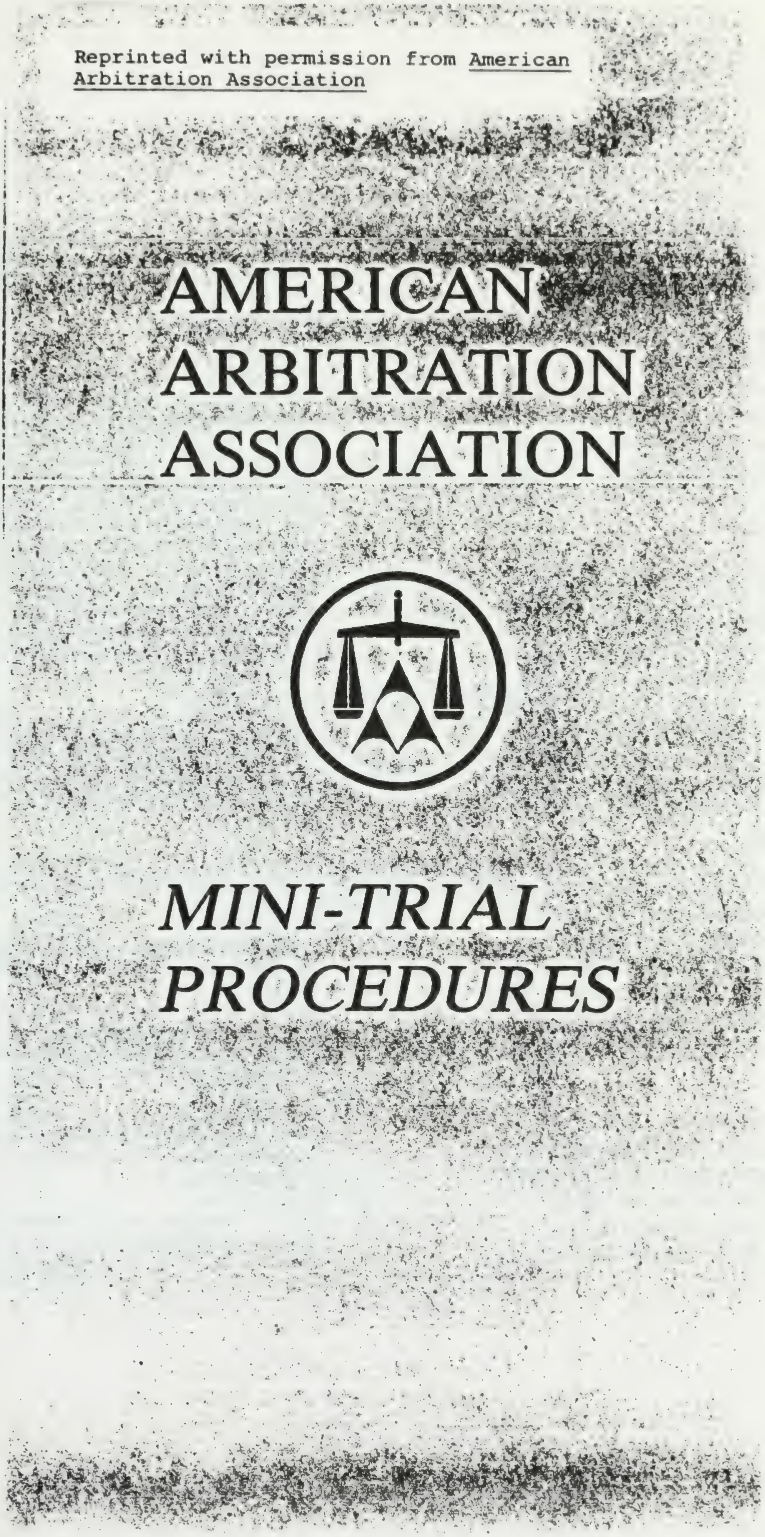
Editor's note: The model mini-trial rules on pages 1 and 8-11 of this issue were drafted by Peter H. Kaskell, Senior Vice President of CPR, and were reviewed prior to publication by an ad hoc committee consisting of CPR staff members and James F. Davis, William L. Ellis Jr., Robert H. Gorske, Eric D. Green, Lynne J. Omlie, Douglas M. Parker, and Malcolm E. Wheeler. These are the first model rules for mini-trials and are designed to be flexible enough to be adopted by virtually any company contemplating submitting a dispute to mini-trial for resolution.

4.1 Discovery should be limited to that for which each party has a substantial need for purposes of the mini-trial information exchange. As a rule, such discovery would be far less extensive than discovery conducted in preparation for a trial. The objective is to enable the parties, through limited discovery on the merits, in a short period to define the issues and to learn the principal strengths and weaknesses of their cases. If litigation between the parties is pending, any prior discovery in that litigation should be taken into account in determining the need for additional discovery.

6.2 The tone of the mini-trial should be one of business-like problem solving. Nevertheless, counsel are expected to vigorously advocate their positions during the mini-trial information exchange.

7.1 In some circumstances negotiation will be more productive if more than one representative of each party participates.

7.2 The Neutral Advisor also may assist in bringing about a settlement by mediating the negotiations. The initiating agreement may provide that the Neutral Advisor will serve as a mediator, or the management representatives may call on him to play that role during the negotiations.



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AMERICAN ARBITRATION ASSOCIATION

MINI-TRIAL PROCEDURES

Introduction

The number and variety of disputes that our complex society generates have overwhelmed the court system, leading to escalating costs and inordinate delays. Use of alternative dispute resolution techniques, including arbitration, mediation, negotiation, and mini-trials, has become increasingly common as businesspeople and attorneys seek more effective ways to resolve disputes.

The American Arbitration Association, founded in 1926, is a private not-for-profit organization committed to the development and administration of alternative dispute resolution procedures. Through its national network of twenty-six regional offices the AAA administers a variety of such procedures and assists parties and counsel in selecting, then using, the appropriate dispute settlement mechanisms.

AAA's Mini-Trial Procedures were developed in response to business needs. Experience indicates that in appropriate cases, the mini-trial is an effective dispute resolution technique that puts the responsibility for resolving business disputes back into the hands of businesspeople.

These procedures were prepared by the American Arbitration Association with the assistance of a special advisory committee. The committee, chaired by Robert A. Keller, included James E. Davis, Joseph P. Decaminada, and Raphael Mur.

American Arbitration Association Mini-Trial Procedures

The mini-trial is a structured dispute resolution method in which senior executives of the parties involved in legal disputes meet in the presence of a neutral advisor and, after hearing presentations of the merits of each side of the dispute, attempt to formulate a voluntary settlement. The following procedures have been developed by the American Arbitration Association to facilitate the use of the mini-trial in business disputes. They are available for the use of any business organization or governmental agency. Any provision, including those relating to the use of a neutral advisor and the imposition of costs, may be altered if the parties so agree.

1. The mini-trial process may be initiated by the written or oral request of either party, made to any regional office of the AAA, but will not be pursued unless both parties agree to resolve their dispute by means of a mini-trial.

2. The course of the mini-trial process shall be governed by a written agreement between the parties.

3. The mini-trial shall consist of an information exchange and settlement negotiation.

4. Each party is represented throughout the mini-trial process by legal counsel whose role is to prepare and present the party's "best case" at the information exchange.

5. Each party shall have in attendance throughout the information exchange and settlement negotiation a senior executive with settlement authority.

6. A neutral advisor shall be present at the information exchange to decide questions of procedure and to render advice to the party representatives when requested by them.

7. The neutral advisor shall be selected by mutual agreement of the parties, who may consult with the AAA for recommendations. To facilitate the selection process, the AAA will make available to the parties a list of individuals to serve as neutral advisors. If the parties fail to agree upon the selection of a neutral advisor, they shall ask that the AAA appoint an advisor from the panel it has compiled for this purpose.

8. Discovery between the parties may take place prior to the information exchange, in accordance with the agreement between the parties.

9. Prior to the information exchange, the parties shall exchange written statements summarizing the issues in the case, and copies of all documents they intend to present at the information exchange.

10. Federal or state rules of evidence do not apply to presentations made at the information exchange. Any limitation on the scope of the evidence offered at the information exchange shall be determined by mutual agreement of the parties prior to the exchange and shall be enforced by the neutral advisor.

11. After the information exchange, the senior executives shall meet and attempt, in good faith, to formulate a voluntary settlement of the dispute.

12. If the senior executives are unable to settle the dispute, the neutral advisor shall render an advisory opinion as to the likely outcome of the case if it were litigated in a court of law. The neutral advisor's opinion shall identify the issues of law and fact which are critical to the disposition of the case and give the reasons for the opinion that is offered.

13. After the neutral advisor has rendered an advisory opinion, the senior executives shall meet for a second time in an attempt to resolve the dispute. If they are unable to reach a settlement at this time, they may either abandon the proceeding or submit to

the neutral advisor written offers of settlement. If the parties elect to make such written offers, the neutral advisor shall make a recommendation for settlement based on those offers. If the parties reject the recommendation of the neutral advisor, either party may declare the mini-trial terminated and resolve the dispute by other means.

14. Mini-trial proceedings are confidential; no written or oral statement made by any participant in the proceeding may be used as evidence or in admission in any other proceeding.

15. The fees and expenses of the neutral advisor shall be borne equally by the parties, and each party is responsible for its own costs, including legal fees, incurred in connection with the mini-trial. The parties may, however, in their written agreement alter the allocation of fees and expenses.

16. Neither the AAA nor any neutral advisor serving in a mini-trial proceeding governed by these procedures shall be liable to any party for any act or omission in connection with the mini-trial. The parties shall indemnify the AAA and the neutral advisor for any liability to third parties arising out of the mini-trial process.

MINI-TRIAL FEE SCHEDULE

Administrative Fee

Parties initiating a mini-trial under these procedures will make arrangements with the AAA regional office for administrative fees and neutral advisor compensation.

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CPR Model Procedure For Mediation of Business Disputes

This model represents a useful working tool. Mediation is a most informal and flexible procedure. There is no one right way to conduct a mediation. PARTIES ARE URGED TO ADAPT THE MODEL TO THEIR OWN CIRCUMSTANCES AND NEEDS.

I: Proposing Mediation

Any party to a business dispute may unilaterally initiate a mediation process by contacting the other party or parties, orally or in writing, and suggesting the use of a neutral mediator to mediate efforts to arrive at a settlement.

II: Selecting the Mediator

Once the parties have agreed in principle to a mediation process, or at least to seriously consider mediation, they will discuss the desired qualifications of the mediator, and who possesses such qualifications. Any party may suggest one or more candidates, or may recommend that the parties choose a mediator from a roster such as the CPR Judicial Panel. The mediator must be selected by agreement of all parties.

Each party shall promptly disclose to the other party any circumstances known to it which would cause reasonable doubt regarding the impartiality of an individual under consideration or appointed as a mediator. Any such individual shall promptly disclose any such circumstances to the parties. If any such circumstances have been disclosed, before or after the individual's appointment as mediator, the individual shall not serve, unless all parties agree.

The mediator's compensation rate will be determined at or before his* appointment. Such compensation, and any other costs of the process, will be shared equally by the parties, unless they otherwise agree.

III: Ground Rules of Proceeding

The ground rules of the proceeding will be:

(1) The process is voluntary and non-binding. Each party may withdraw at any time by notifying the mediator and the other party or parties in writing of its intent to withdraw.

(2) The mediator shall be neutral and impartial.

(3) The mediator controls the procedural aspects of the mediation. The parties will cooperate fully with the mediator.

  (a) There will be no direct communication between the parties or between their attorneys without the concurrence of the mediator.

  (b) The mediator is free to meet and communicate separately with each party.

  (c) The mediator will decide when to hold separate meetings with the parties and when to hold joint meetings. The mediator will fix the time and place of each session and the agenda, in consultation with the parties.

(4) Each party may be represented by more than one person, e.g. a business executive and an attorney. At least one representative of each party will be authorized to negotiate a settlement of the dispute.

(5) The process will be conducted expeditiously. Each representative will make every effort to be available for meetings.

(6) The mediator will not transmit information given him by any party to another party, unless authorized to do so.

(7) The entire process is confidential. The parties and the mediator will not disclose information regarding the process, including settlement terms, to third parties, unless the parties otherwise agree. The process shall be treated as a compromise negotiation for purposes of the Federal Rules of Evidence and state rules of evidence. The mediator will be disqualified as a witness, consultant or expert in any pending or future action relating to the subject matter of the mediation, including those between persons not parties to the mediation.

(8) If the dispute goes to arbitration, the mediator shall not serve as an arbitrator, unless the parties otherwise agree.

(9) The mediator, if a lawyer, may freely express his views to the parties on the legal issues of the dispute, unless a party objects to his so doing.

(10) The mediator may obtain assistance and indepen-

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*The male pronoun applies to persons of either sex.

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dent expert advice with the agreement of and at the expense of the parties.

(11) The mediator shall not be liable for any act or omission in connection with his role as mediator.

(12) The parties will refrain from court proceedings during the mediation process, insofar as they can do so without prejudicing their legal rights. If litigation is pending between the parties regarding the subject matter of the mediation, the parties may agree to inform the court of the mediation process and the name of the mediator, and they may request a stay of court proceedings. Insofar as possible, discovery will be suspended while the mediation is ongoing.

Once a mediator has been selected, the representatives of the parties will meet jointly with the mediator to discuss the above ground rules and any different or additional ground rules the mediator or a party wishes to propose. The parties and the mediator may agree on whether the parties will be the first to make settlement proposals, or whether they wish the mediator to make such a proposal once he has familiarized himself with the dispute.

IV: Submission of Materials to the Mediator

Upon entering into mediation each party will submit to the mediator such material and information as it deems necessary to familiarize the mediator with the dispute. Submissions may be made in writing and orally.

The mediator may request any party to provide clarification and additional information. The mediator may raise legal questions and arguments and may request any party's attorney to brief legal issues.

The mediator may request such party, separately or at a joint meeting, to present its case informally to the mediator.

V: Negotiation of Settlement Terms

Once the mediator has familiarized himself with the case, he will hold discussions with the representatives of the parties. The mediator will decide when to meet or confer separately with each party, and when to hold joint meetings. The mediator may assist the parties in arriving at a settlement in a variety of ways (see commentary).

If the parties should have failed to develop mutually acceptable settlement terms, the mediator before terminating the procedure may submit to the parties a final settlement proposal which he considers equitable to all parties. The parties will carefully consider any such proposal, and at the request of the mediator will discuss the proposal with him.

Efforts to reach a settlement will continue until (a) a settlement is reached, or (b) one of the parties withdraws from the process, or (c) the mediator concludes and informs the parties that further efforts would not be useful.

VI: Settlement

If a settlement is reached, the mediator, or one of the parties at his request, will draft a written settlement document incorporating all settlement terms. This draft will be circulated among the parties, edited as necessary, and if acceptable formally executed.

Commentary on CPR Model Procedure For Mediation of Business Disputes

Introduction

For centuries parties to a disagreement or dispute have been known to seek the advice and assistance of a wise friend or other third party, in whose impartiality and judgment they had confidence, to help them settle their dispute. They recognized that self-interest can cloud objectivity, and that a neutral may see solutions which eluded them.

Today, mediation is commonly used to resolve business disputes in the Far East. In the United States, mediation is used widely in settling disputes between organized labor and management and certain other types of disputes, but is used infrequently in a dispute between two or more companies. When it is used, often a settlement is reached.

CPR and its Mediation Committee, comprised of leading jurists, believe that a mediation process conducted by a skilled mediator is a pragmatic, effective way to resolve, preferably at an early stage, many types of disputes between companies which share a genuine desire to settle, or between a company and a public institution. Among such types of disputes are commercial disputes; construction disputes; technology, trademark and unfair competition disputes; private anti-trust disputes; disputes between joint venturers; and mineral extraction disputes. CPR is issuing a modified version of this model for disputes between employers and non-union employees or former employees.

I: Proposing Mediation*

Parties contemplating mediation should consider that mediation is private, voluntary, informal and non-binding. A mediation typically is concluded expeditiously, at modest cost. The process is far less adversarial than litigation or arbitration, typically permitting the business relationship to be preserved. Since other options are not foreclosed if mediation should fail, entering into a mediation process is essentially without risk.

Generally, it is preferable for the disputants to agree to a mediation process before resorting to litigation; however, the pendency of litigation does not preclude mediation. Judges have been known to urge litigants to engage in mediation, and some courts have adopted non-binding court-annexed processes which resemble mediation, for certain types of cases.

The mediator's fee and other expenses of a mediation are normally shared equally. However, a party proposing a mediation may offer to pay the entire cost, or more than an equal share of the cost.

The human dimension of conflict is most significant. Once a dispute has erupted, anger, combativeness, a need to win or "get even" easily become barriers to a solution in the best interests of both parties. Typically, both believe they are in the right. Even the objectivity of an experienced lawyer can become impaired, as he convinces himself of the righteousness of his client's cause.

A critical event in the mediation process is the first step—getting agreement to use it. At that point the parties' attitude usually shifts toward problem solving and wary cooperation. A skillful mediator will reinforce this change in attitude and will defuse hostility. In the mediation process psychology works for settlement. The negotiators are challenged to find a solution. The momentum of mediation leads toward settlement. Settlement equals success.

II: Selecting the Mediator

The selection of a most capable mediator is vital. The mediator is not vested with the legal authority of a judge or arbitrator. He is not given a script. He must rely on his own resources.

- He must be absolutely impartial and fair and so perceived.**
- He must inspire trust and motivate people to confide in him.
- He must be able to size up people, understand their motivations, relate easily to them.
- He must set a tone of civility and consideration in his dealings with others.
- He must be a good listener.
- He must be capable of understanding thoroughly the law and facts of a dispute, including surrounding circumstances. He must quickly analyze complex problems and get to the core.
- He must know when to intervene, and when to stay out of the way.
- He must be creative, imaginative and ingenious in developing proposals that will "fly" and know when to make such proposals. He must be a problem solver.
- He must be articulate and persuasive.
- He must possess a thorough understanding of the negotiating process.
- He must be patient, persistent, indefatigable, and "upbeat" in the face of difficulties.
- He must be an energetic leader, a person who can make things happen.
- It can be helpful for the mediator to have prestige and a personal stature that command respect.
- Occasionally, a dash of humor helps.

The mediator can come from various disciplines. He might be a former judge, a senior executive, a leading attorney, the dean or a professor of a leading law school or business school.

When legal issues are critical, there are significant advantages to selecting a lawyer or legal academic as the mediator. When the subject matter of the dispute is technical, it may well be desirable to select a person who has an understanding of the technology, but a specialist lacking the attributes described above would not be the best answer.

In most cases a single mediator will be used; however, in particularly complex cases using two mediators may have advantages. They could represent different disciplines relevant to the dispute, e.g. science and law; and by conferring with each other they may develop additional settlement options.

The CPR Judicial Panel consists of eminent former judges, legal academics and other leaders of the bar who may serve as mediators. CPR is available, at the request of a party to a business dispute, to interest the other party or parties in entering into a mediation, and CPR will recommend neutrals highly qualified for a particular assignment.

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*Headings I-VI refer to sections of the model.

**The mediator's taking positions on issues and making recommendations is not inconsistent with impartiality.

III: Ground Rules of Proceeding

(Paragraph numbers below refer to numbered ground rules in model)

(3) Conceptually, a mediated negotiation has substantive, procedural and human dimensions. The mediator should control procedure and have influence on the substantive and human dimensions. He may encourage the parties to take the lead with regard to the substance of the dispute, if necessary taking a more active role as the process unfolds, proposing his own settlement terms and urging their acceptance.

(3) The mediator, to be effective, must keep fully informed of all developments and must be able to control dialogue between the parties. He may conclude at a given stage that it is preferable to keep the parties apart. It is important, therefore, that the parties and their attorneys do not communicate with each other directly without the mediator's concurrence while the process is ongoing.

(3) At separate meetings a party can share information with the mediator which it is not then willing to share with the other party. Such a meeting also provides an opportunity for the mediator and the party to consider the party's underlying interests and to informally explore settlement options. Joint meetings can provide an opportunity for cooperative exploration of possible solutions among the parties and the mediator.

(4) Most complex business disputes involve legal and factual issues. Lawyers will play an important role in counseling their clients and most likely will participate actively in the mediation process. It is highly desirable that the parties' negotiating teams include senior executives, who may well be able to develop a constructive business solution.

(4) The negotiations are more likely to succeed if the negotiators do not feel a need to defend past actions. It is preferable that the management representatives shall not have participated directly or actively in the events giving rise to the dispute. As a rule, the more senior the management representatives, the greater the range of options for constructive solutions they will perceive. Dispute settlement need not be a "zero sum game." Often, the pie can be enlarged, not merely divided.

(4) It is important that at least one representative of each party have authority to negotiate a settlement. If the subject matter is very large, approval by the parties' boards of directors may be a condition of the settlement.

(5) The parties should discuss whether the mediator and the parties' negotiators will be able to devote sufficient time to the mediation to assure its expeditious completion.

(7) If maintaining the confidentiality of the mediation process is important to the parties, or either of them, we suggest that the parties and the mediator enter into an agreement confirming their obligations with respect to confidentiality.

(10) The mediator may well need administrative assistance, legal research, or other forms of assistance. It is desirable for the mediator and the parties to discuss early on the types of assistance likely to be needed and the mediator's resources for obtaining the same.

During the mediator's first meeting with the parties, he may well wish to have them confirm to him that they have a genuine desire to settle their dispute.

Many controversies hinge on a single key factual issue which often can be resolved by an independent expert, operating under ground rules on which the parties have agreed. Does the machine perform in accordance with contractual specifications? Is the former executive using information proprietary to his former employer? Were the soil conditions as represented to the contractor, and if not, how much additional expense did he incur? These are questions for persons familiar with the relevant technology. Similarly, a consumer polling organization can determine the extent of confusion caused by two allegedly similar trademarks. Once such critical questions have been answered by a neutral expert, the controversy may, as a practical matter, resolve itself. In appropriate cases, the parties and the mediator should consider retaining an independent expert and spelling out the ground rules for his assignment.

V: Negotiation of Settlement Terms

Negotiation, as Professors Fisher and Ury emphasize, is most productive when the parties focus on their underlying interests and concerns, avoiding fixed positions which often obscure what a party really wants. The mediator can help the parties crystallize their own interests and understand each other's. He can defuse adversarial stances and develop a cooperative, problem solving approach. He can narrow the range of issues, pinpoint the most serious concerns of each party, and generate new ideas for settlement.

The mediator's role can run the gamut from that of a facilitator who arranges meetings between the negotiators in a setting conducive to cooperation, to that of an activist who will early on announce settlement terms and will urge the parties to accept his terms. It has been suggested that there is a continuum in terms of how large a role mediators play. These activities have been listed from the least to the most active:*

- urging both parties to agree to talk
- helping parties understand the mediation process
- carrying messages between parties
- helping parties agree upon an agenda
- setting an agenda
- providing a suitable environment for negotiation
- maintaining order
- helping participants understand the problem(s)
- defusing unrealistic expectations
- helping the participants develop their own proposals
- helping the participants negotiate
- suggesting solutions
- persuading participants to accept a particular settlement

What a mediator should do will depend on the nature of the conflict, the issues in dispute, the kind of parties involved, and their relationship with each other and the mediator. It will also depend on the mediator's resources—his legitimacy, experience, judgment, and intuition.

If the mediation process should fail, litigation is highly likely to follow. The mediator, if a lawyer, might give the parties his educated, objective appraisal of the strengths and weaknesses of their positions and the likely outcome of a trial. The mediator also can help each party make a realistic estimate of the costs of litigation—outside counsel fees and time devoted by in house counsel, executives, and other staff; less tangible costs such as "wear and tear," diversion of executive energies, lost opportunities, prolonged uncertainty, damage to business relationships, and sometimes impediments to financing.

We urge that business executives play an active role in the negotiations, and that the negotiations be viewed as an opportunity to find the best solution to a business problem, rather than a forum for argument about legal positions.

Conscientious lawyers make intensive preparations for a trial; yet preparations for an important negotiation often are quite casual. Preparation is critical. The better prepared negotiator has a significant edge. It is equally important that the mediator be well prepared.

VI: Settlement

If litigation is pending, it may be appropriate for the parties to arrange for dismissal of the case upon execution of the settlement agreement, or to reduce the settlement agreement to a judgment.

VII: Commercial Agreement Clause

We encourage counsel drafting a commercial agreement to incorporate the model procedure by reference. The following language is suggested:

> "The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this agreement by mediation in accordance with the CPR Model Procedure for Mediation of a Business Dispute."

The above clause may not create an enforceable right or obligation. However, if a dispute should arise, such a clause, whether enforceable or not, would substantially increase the likelihood that the parties would make a serious effort to arrive at a compromise through mediation, rather than seeking an adjudicative solution. In any event, mediation is more likely to succeed if the parties have a genuine motivation to make it succeed.

The commercial agreement also could provide that if a dispute arises, negotiations between executives would be the first step; if negotiations become deadlocked, mediation would be the second step.

VIII: Transnational Disputes

Litigation or arbitration of disputes between companies in different countries tends to be particularly burdensome, protracted and damaging to business relationships. The concept of mediation is not alien to many foreign businessmen, and mediation should be considered as a transnational dispute resolution process. The CPR model procedure is applicable to transnational disputes. When such a dispute involves two parties of different cultures, it may be helpful to use two mediators—one from each culture.

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*L.L. Riskin, "The Special Place of Mediation in Alternative Dispute Processing, 36 U. Fla. L. Rev. _____ (1985)

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Commercial
Mediation
Rules

As amended
and in effect
February 1, 1986

Harry De Jur Commercial
Mediation Center of the
American Arbitration Association

Introduction

In some situations, the involvement of an impartial mediator can assist parties in reaching a settlement of a commercial dispute. Mediation is a process under which the parties submit their dispute to an impartial person—the mediator. The mediator may suggest ways of resolving the dispute, but cannot impose a settlement on the parties.

If the parties want to use a mediator to resolve an existing dispute under these Rules, they can enter into the following submission:

> The parties hereby submit the following dispute to mediation under the Commercial Mediation Rules of the American Arbitration Association. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)

If the parties want to adopt mediation as an integral part of their contractual dispute settlement procedure, they can insert the following mediation clause in their contract in conjunction with a standard arbitration provision:

> If a dispute arises out of or relates to this contract, or the breach thereof, and if said dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association, before resorting to arbitration, litigation, or some other dispute resolution procedure.

These Rules were prepared by the staff of the American Arbitration Association with the assistance of the Harry De Jur Commercial Mediation Center Advisory Committee. The committee, chaired by David A. Botwinik, included Robert F. Borg, Ralph Katz, Robert McLucas, Roland Plottel, Frank J. Scardilli, Janet M. Spencer, and Robert B. Underhill.

Commercial Mediation Rules

1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation of existing or future disputes under the auspices of the American Arbitration Association (AAA) or under these Rules, they shall be deemed to have made these Rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement.

2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation by filing with the AAA a written request for mediation pursuant to these Rules, together with the appropriate administrative fee contained in the Administrative Fee Schedule.

3. Request for Mediation

A request for mediation shall contain a brief statement of the nature of the dispute and the names, addresses, and phone numbers of all parties to the dispute, and those who will represent them, if any, in the mediation. The initiating party shall simultaneously file two (2) copies of the request with the AAA and one copy with every other party to the dispute.

4. Appointment of Mediator

Upon receipt of a request for mediation, the AAA will appoint a qualified mediator to serve. Normally, a single mediator will be appointed unless the parties agree otherwise or the AAA determines otherwise. If the agreement of the parties names a mediator or specifies a method of appointing a mediator, that designation or method shall be followed.

5. Qualifications of a Mediator

No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation, except by the written consent of all parties. Prior to accepting an appointment, the prospective mediator shall disclose any circumstances likely to create a presumption of bias or prevent a prompt meeting with the parties. Upon receipt of such information, the AAA shall either replace the mediator or immediately communicate the information to the parties for their comments. In the event the parties disagree as to whether the mediator shall serve, the AAA will appoint another mediator. The AAA is authorized to appoint another mediator if the appointed mediator is unable to serve promptly.

6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise.

7. Representation

Any party may be represented by persons of their choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

8. Time and Place of Mediation

The mediator shall fix the time of each mediation session. The mediation shall be held at the appropriate regional office of the AAA, or at any other convenient location agreeable to the mediator and the parties, as the mediator shall determine.

9. Identification of Matters in Dispute

At least ten (10) days prior to the first scheduled mediation session, each party shall provide the mediator with a brief memorandum setting forth its position with regard to the issues that need to be resolved. At the discretion of the mediator, such memoranda may be mutually exchanged by the parties.

At the first session, the parties will be expected to produce all information reasonably required for the mediator to understand the issues presented. The mediator may require either party to supplement such information.

10. Authority of Mediator

The mediator does not have authority to impose a settlement upon the parties but will attempt to help the parties reach a satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties and to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall by made by the mediator or the parties, as the mediator shall determine.

The mediator is authorized to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties.

11. Privacy

Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

12. Confidentiality

Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the mediator. All records, reports, or other documents received by a mediator while serving in such capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding:

(a) views expressed or suggestions made by the other party with respect to a possible settlement of the dispute;

(b) admissions made by the other party in the course of the mediation proceedings;

(c) proposals made or views expressed by the mediator; or

(d) the fact that the other party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

13. No Stenographic Record

There shall be no stenographic record of the mediation process.

14. Termination of Mediation

The mediation shall be terminated:

(a) by the execution of a settlement agreement by the parties;

(b) by a written declaration of the mediator to the effect that further efforts at mediation are no longer worthwhile; or

(c) by a written declaration of a party or parties to the effect that the mediation proceedings are terminated.

15. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation.

Neither the AAA nor any mediator shall be liable to any party for any act or omission in connection with any mediation conducted under these Rules.

16. Interpretation and Application of Rules

The mediator shall interpret and apply these Rules insofar as they relate to the mediator's duties and responsibilities. All other Rules shall be interpreted and applied by the AAA.

17. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, including required traveling and other expenses of the mediator and representatives of the AAA, and the expenses of any witness, or the cost of any proofs or expert advice produced at the direct request of the mediator, shall be borne equally by the parties unless they agree otherwise.

FEE SCHEDULE

Administrative Fee

Each party shall pay an initial AAA administrative fee in accordance with this schedule, at the time of filing the mediation request. If the parties to an arbitration pending before the AAA agree to mediate under these Rules, no additional administrative fee is required to initiate the mediation.

Amount of Claim	Fee
$1 to $100,000	$250 per party
$100,001 to $250,000	$500 per party
$250,001 to $500,000	$650 per party
$500,001 to $1.5 million	$850 per party

Where the claim or counterclaim exceeds $1.5 million, an appropriate fee will be determined by the AAA.

When no amount can be stated at the time of filing or the claims and counterclaims are not for a monetary amount, an appropriate administrative fee will be determined by the AAA.

Additional Sessions

A fee of $50 is payable to the AAA by each party for each second and subsequent mediation session that is either attended by an AAA staff representative or held in a hearing room provided by the Association.

Mediator's Fee

Mediators on the AAA's Commercial Mediation Panel shall be compensated at a reasonable rate, agreeable to the parties, to be arranged by the AAA. The mediator's fee shall be borne equally by the parties unless they agree otherwise.

Deposits

Before the commencement of mediation, the parties shall each deposit such portion of the fee covering the cost of mediation as the AAA shall direct, and all appropriate additional sums which the AAA deems necessary to defray the expenses of the proceeding. When the mediation has terminated, the AAA shall render an accounting and return any unexpended balance to the parties.

Refunds

If a request for mediation is declined by the responding party, the AAA shall refund all of the administrative fee in excess of $100 paid by a party. Once the parties agree to mediate, no refund of the administrative fee will be made.

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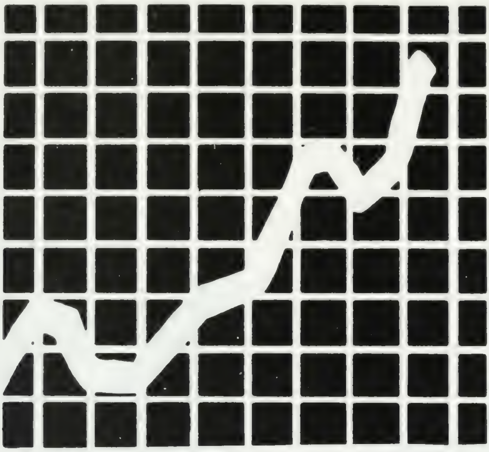

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RULES

Commercial Arbitration Rules

As amended and in effect, March 1, 1986

American Arbitration Association
140 West 51st Street, New York, NY 10020-1203
Telephone: (212) 484-4000
Telecopier: (212) 765-4874

For the Arbitration of future disputes:

The American Arbitration Association recommends the following arbitration clause for insertion in all commercial contracts:

> **Standard Arbitration Clause**
> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

For the Submission of existing disputes:

> We, the undersigned parties, hereby agree to submit to arbitration under the Commercial Arbitration Rules of the American Arbitration Association the following controversy: (cite briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s) selected from the panels of arbitrators of the American Arbitration Association. We further agree that we will faithfully observe this agreement and the rules, and that we will abide by and perform any award rendered by the arbitrator(s) and that a judgment of the court having jurisdiction may be entered upon the award.

If either party is from a country other than the United States, be sure to request a copy of the Supplementary Procedures for International Commercial Arbitration.

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Commercial Arbitration Rules

1. Agreement of Parties

The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association or under its rules. These rules and any amendment thereof shall apply in the form obtaining at the time the arbitration is initiated.

2. Name of Tribunal

Any tribunal constituted by the parties for the settlement of their dispute under these rules shall be called the Commercial Arbitration Tribunal.

3. Administrator

When parties agree to arbitrate under these rules, or when they provide for arbitration by the American Arbitration Association and an arbitration is initiated thereunder, they thereby constitute the AAA the administrator of the arbitration. The authority and obligations of the administrator are prescribed in the agreement of the parties and in these rules.

4. Delegation of Duties

The duties of the AAA under these rules may be carried out through tribunal administrators or such other officers or committees as the AAA may direct.

5. National Panel of Arbitrators

The AAA shall establish and maintain a National Panel of Arbitrators and shall appoint arbitrators therefrom as hereinafter provided.

6. Office of Tribunal

The general office of a tribunal is the headquarters of the AAA, which may, however, assign the administration of an arbitration to any of its regional offices.

7. Initiation under an Arbitration Provision in a Contract

Arbitration under an arbitration provision in a contract may be initiated in the following manner:

(a) The initiating party shall give notice to the other party of its intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved, if any, the remedy sought, and

(b) Shall file at any regional office of the AAA three copies of said notice and three copies of the arbitration provisions of the contract, together with the appropriate administrative fee as provided in the Administrative Fee Schedule.

The AAA shall give notice of such filing to the other party. If so desired, the party upon whom the Demand for arbitration is made may file an answering statement in duplicate with the AAA within seven days after notice from the AAA, in which event said party shall simultaneously send a copy of the answer to the other party. If a monetary claim is made in the answer, the appropriate fee provided in the Administrative Fee Schedule shall be forwarded to the AAA with the answer. If no answer is filed within the stated time, it will be assumed that the claim is denied. Failure to file an answer shall not operate to delay the arbitration.

Unless the AAA in its discretion determines otherwise, the Expedited Procedures of the Commercial Arbitration Rules shall be applied in any case where the total claim of any party does not exceed $15,000, exclusive of interest and arbitration costs. The Expedited Procedures shall be applied as described in Sections 54 through 58 of these rules.

8. Change of Claim

After filing of the claim, if either party desires to make any new or different claim, such claim shall be made in writing and filed with the AAA, and a copy thereof shall be mailed to the other party, who shall have a period of seven days from the date of such mailing within which to file an answer with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

9. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these rules by filing at any regional office two copies of a written agreement to arbitrate under these rules (Submission), signed by the parties. It shall contain a statement of the matter in dispute, the amount of money involved, if any, and the remedy sougnt, together with the appropriate administrative fee as provided in the Administrative Fee Schedule.

10. Pre-hearing Conference and Preliminary Hearing

At the request of the parties or at the discretion of the AAA, a pre-hearing conference with the administrator and the parties will be scheduled in appropriate cases to arrange for an exchange of information and the stipulation of uncontested facts to expedite the arbitration proceedings.

In large or complex cases, at the discretion of the arbitrator(s) or the AAA, a preliminary hearing will be scheduled with the arbitrator(s) and the parties to arrange for the production of relevant documents and other evidence, to identify witnesses to be called, to schedule further hearings, and to consider any other matters which will expedite the arbitration proceedings.

11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If the locale is not designated within seven days from the date of filing the Demand or Submission, the AAA shall have the power to determine the locale. Its decision shall be final and binding. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within seven days after notice of the request, the locale shall be the one requested.

12. Qualifications of an Arbitrator

Any arbitrator appointed pursuant to Section 13 or Section 15 shall be neutral, subject to disqualification for the reasons specified in Section 19. If the agreement of the parties names an arbitrator or specifies any other method of appointing an arbitrator, or if the parties specifically so agree in writing, such arbitrator shall not be subject to disqualification for said reasons.

13. Appointment from Panel

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA

shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the panel. Each party to the dispute shall have seven days from the mailing date in which to cross off any names objected to, number the remaining names to indicate the order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree upon any of the persons named, if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the panel without the submission of any additional list.

14. Direct Appointment by Parties

If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the appointing party, shall be filed with the AAA by that party. Upon the request of any such appointing party, the AAA shall submit a list of members of the panel from which the party may, if it so desires, make the appointment.

If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make such appointment within that period, the AAA shall make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the parties to make the appointment and if within seven days thereafter such arbitrator has not been so appointed, the AAA shall make the appointment.

15. Appointment of Neutral Arbitrator by Party-Appointed Arbitrators

If the parties have appointed their arbitrators, or if either or both of them have been appointed as provided in Section 14, and have authorized such arbitrators to appoint a neutral arbitrator within a specified time and no appointment is made within such time or any agreed extension thereof, the

AAA shall appoint a neutral arbitrator who shall act as chairperson.

If no period of time is specified for appointment of the neutral arbitrator and the parties do not make the appointment within seven days from the date of the appointment of the last party-appointed arbitrator, the AAA shall appoint such neutral arbitrator, who shall act as chairperson.

If the parties have agreed that their arbitrators shall appoint the neutral arbitrator from the panel, the AAA shall furnish to the party-appointed arbitrators, in the manner prescribed in Section 13, a list selected from the panel, and the appointment of the neutral arbitrator shall be made as prescribed in that section.

16. Nationality of Arbitrator in International Arbitration

If one of the parties is a national or resident of a country other than the United States, the sole arbitrator or the neutral arbitrator shall, upon the request of either party, be appointed from among the nationals of a country other than that of any of the parties.

17. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that a greater number of arbitrators be appointed.

18. Notice to Arbitrator of Appointment

Notice of the appointment of the neutral arbitrator, whether appointed by the parties or by the AAA, shall be mailed to the arbitrator by the AAA, together with a copy of these rules, and the signed acceptance of the arbitrator shall be filed prior to the opening of the first hearing.

19. Disclosure and Challenge Procedure

A person appointed as neutral arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such arbitrator or another source, the AAA shall communicate the information to

the parties, and, if it deems it appropriate to do so, to the arbitrator and others. Thereafter, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

20. Vacancies

If any arbitrator should resign, die, withdraw, refuse, be disqualified, or be unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

In the event of a vacancy in a panel of neutral arbitrators, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

21. Time and Place

The arbitrator shall fix the time and place for each hearing. The AAA shall mail to each party notice thereof at least five days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

22. Representation by Counsel

Any party may be represented by counsel. A party intending to be so represented shall notify the other party and the AAA of the name and address of counsel at least three days prior to the date set for the hearing at which counsel is first to appear. When an arbitration is initiated by counsel or when an attorney replies for the other party, such notice is deemed to have been given.

23. Stenographic Record

Any party wishing a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of such arrangements in advance of the hearing. The requesting party or parties shall pay the cost of such record.

24. Interpreters

Any party wishing an interpreter shall make all arrangements directly with an interpreter and shall assume the costs of such service.

25. Attendance at Hearings

The arbitrator shall maintain the privacy of the hearings unless the law provides to the contrary.

Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

26. Adjournments

The arbitrator may take an adjournment upon the request of a party or upon the arbitrator's own initiative and shall take such adjournment when all of the parties agree thereto.

27. Oaths

Before proceeding with the first hearing or with the examination of the file, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator has discretion to require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or demanded by either party, shall do so.

28. Majority Decision

Whenever there is more than one arbitrator, all decisions of the arbitrators must be by at least a majority. The award must also be made by at least a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

29. Order of Proceedings

A hearing shall be opened by the filing of the oath of the arbitrator, where required; by the recording of the place, time, and date of the hearing, and the presence of the arbitrator, the parties, and counsel, if any; and by the receipt by the arbitrator of the statement of the claim and answer, if any.

The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved.

The complaining party shall then present its claim, proofs, and witnesses, who shall submit to questions or other examination. The defending party shall then present its defense, proofs, and witnesses, who shall submit to questions or other examination. The arbitrator has discretion to vary this procedure but shall afford full and equal opportunity to all parties for the presentation of any material or relevant proofs.

Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and the exhibits in order received shall be made a part of the record.

30. Arbitration in the Absence of a Party

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party that, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

31. Evidence

The parties may offer such evidence as is relevant and material to the dispute and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent in default or has waived the right to be present.

32. Evidence by Affidavit and Filing of Documents

The arbitrator shall receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.

All documents not filed with the arbitrator at the hearing but arranged for at the hearing or subsequently by agreement of the parties shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded opportunity to examine such documents.

33. Inspection or Investigation

Whenever the arbitrator deems it necessary to make an inspection or investigation in connection with the arbitration, the arbitrator shall direct the AAA to advise the parties of such intention. The arbitrator shall set the time and the AAA shall notify the parties thereof. Any party who so desires may be present at such inspection or investigation. In the event that one or both parties are not present at the inspection or investigation, the arbitrator shall make a verbal or written report to the parties and afford them an opportunity to comment.

34. Conservation of Property

The arbitrator may issue such orders as may be deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.

35. Closing of Hearings

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, or if satisfied that the record is complete, the arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs are to be filed, the hearings shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided for in Section 32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearings. The time limit within which the arbitrator is required to make the award shall commence to run, in the absence of other agreements by the parties, upon the closing of the hearings.

36. Reopening of Hearings

The hearings may be reopened on the arbitrator's own motion, or upon application of a party, at any time before the award is made. If reopening the hearings would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened unless the parties agree upon the extension of such time. When no specific date is fixed in the contract, the arbitrator may reopen the hearings and shall have thirty days from the closing of the reopened hearings within which to make an award.

37. Waiver of Oral Hearings

The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are

unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

38. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state objection thereto in writing, shall be deemed to have waived the right to object.

39. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any such extension and its reason therefor.

40. Communication with Arbitrator and Serving of Notice

(a) There shall be no communication between the parties and a neutral arbitrator other than at oral hearings. Any other oral or written communication from the parties to the arbitrator shall be directed to the AAA for transmittal to the arbitrator.

(b) Each party to an agreement which provides for arbitration under these rules shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith; or for the entry of judgment on any award made thereunder may be served upon such party by mail addressed to such party or its attorney at the last known address or by personal service, within or without the state wherein the arbitration is to be held (whether such party be within or without the United States of America), provided that reasonable opportunity to be heard with regard thereto has been granted such party.

41. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than thirty days from the date of closing the hearings, or, if oral hearings have been waived, from the date of transmitting the final statements and proofs to the arbitrator.

42. Form of Award

The award shall be in writing and shall be signed either by the sole arbitrator or by at least a majority if there be more than one. It shall be executed in the manner required by law.

43. Scope of Award
The arbitrator may grant any remedy or relief which the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract. The arbitrator, in the award, shall assess arbitration fees and expenses in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA.

44. Award upon Settlement
If the parties settle their dispute during the course of the arbitration, the arbitrator may, upon their request, set forth the terms of the agreed settlement in an award.

45. Delivery of Award to Parties
Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at its last known address or to its attorney; personal service of the award; or the filing of the award in any other manner that may be prescribed by law.

46. Release of Documents for Judicial Proceedings
The AAA shall, upon the written request of a party, furnish to such party, at its expense, certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

47. Applications to Court and Exclusion of Liability
(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration.

(c) Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

48. Administrative Fees
As a not-for-profit organization, the AAA shall prescribe an Administrative Fee Schedule and a Refund Schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing or the time of refund shall be applicable.

The administrative fees shall be advanced by the initiating party or parties, subject to final apportionment by the arbitrator in the award.

When a matter is withdrawn or settled, the refund shall be made in accordance with the Refund Schedule.

The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fee.

49. Fees when Oral Hearings Are Waived
When all oral hearings are waived under Section 37, the Administrative Fee Schedule shall apply.

50. Expenses
The expenses of witnesses for either side shall be paid by the party producing such witnesses.

The cost of the stenographic record, if any is made, and all transcripts thereof, shall be prorated equally among all parties ordering copies unless they shall otherwise agree, and shall be paid for by the responsible parties directly to the reporting agency.

All other expenses of the arbitration, including required traveling and other expenses of the arbitrator and of AAA representatives and the expenses of any witness or the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator, in the award, assesses such expenses or any part thereof against any specified party or parties.

51. Arbitrator's Fee
Members of the National Panel of Arbitrators who serve as neutral arbitrators do so in most

cases without fee. In prolonged or in special cases the parties may agree to pay a fee, or the AAA may determine that payment of a fee by the parties is appropriate and may establish a reasonable amount, taking into account the extent of service by the arbitrator and other relevant circumstances of the case. When neutral arbitrators are to be paid, the arrangements for compensation shall be made through the AAA and not directly between the parties and the arbitrators.

52. Deposits

The AAA may require the parties to deposit in advance such sums of money as it deems necessary to defray the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance.

53. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of any such rule, it shall be decided by a majority vote. If that is unobtainable, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

EXPEDITED PROCEDURES

54. Notice by Telephone

The parties shall accept all notices from the AAA by telephone. Such notices by the AAA shall subsequently be confirmed in writing to the parties. Notwithstanding the failure to confirm in writing any notice or objection hereunder, the proceeding shall nonetheless be valid if notice has, in fact, been given by telephone.

55. Appointment and Qualifications of Arbitrator

The AAA shall submit simultaneously to each party to the dispute an identical list of five members of the National Panel of Arbitrators, from which one arbitrator shall be appointed. Each party shall have the right to strike two names from the list on a peremptory basis. The list is returnable to the AAA within ten days from the date of mailing. If for any reason the appointment cannot be made from the list, the AAA shall have the authority to make the appointment from among other members of the panel without the submission of additional lists. Such appointment shall be subject to disqualification for the reasons specified in Section 19. The parties shall be given notice by telephone by the AAA of the appointment of the arbitrator. The parties shall notify the AAA, by telephone, within seven days of any objection to the arbitrator appointed. Any objection by a party to such arbitrator shall be confirmed in writing to the AAA with a copy to the other party(ies).

56. Time and Place of Hearing

The arbitrator shall fix the date, time, and place of the hearing. The AAA will notify the parties by telephone, seven days in advance of the hearing date. Formal Notice of Hearing will be sent by the AAA to the parties.

57. The Hearing

Generally, the hearing shall be completed within one day. The arbitrator may, for good cause shown, schedule an additional hearing to be held within five days.

58. Time of Award

Unless otherwise agreed to by the parties, the award shall be rendered not later than five business days from the date of the closing of the hearing.

ADMINISTRATIVE FEE SCHEDULE

The administrative fee of the AAA is based upon the amount of each claim and counterclaim as disclosed when the claim and counterclaim are filed, and is due and payable at the time of filing.

Amount of Claim	Fee	
$1 to $20,000	3%	($200 minimum)
$20,000 to $40,000	$600,	plus 2% of excess over $20,000
$40,000 to $80,000	$1,000,	plus 1% of excess over $40,000
$80,000 to $160,000	$1,400,	plus ½% of excess over $80,000
$160,000 to $5,000,000	$1,800,	plus ¼% of excess over $160,000

Where the claim or counterclaim exceeds $5 million, an appropriate fee will be determined by the AAA.

When no amount can be stated at the time of filing, the administrative fee is $500, subject to adjustment in accordance with the above schedule as soon as an amount can be disclosed.

In those claims and counterclaims which are not for a monetary amount, an appropriate administrative fee will be determined by the AAA.

If there are more than two parties represented in the arbitration, an additional 10% of the initiating fee will be due for each additional represented party.

OTHER SERVICE CHARGES

$50 is payable by a party causing an adjournment of any scheduled hearing;

$100 payable by a party causing a second or additional adjournment of any scheduled hearing; and

$50 payable by each party for each hearing after the first hearing which is either clerked by the AAA or held in a hearing room provided by the AAA.

REFUND SCHEDULE

If the AAA is notified that a case has been settled or withdrawn before a list of arbitrators has been sent out, all of the fee in excess of $200 will be refunded.

If the AAA is notified that a case has been settled or withdrawn before the original due date for the return of the first list, two-thirds of the fee in excess of $200 will be refunded.

If the AAA is notified that a case has been settled or withdrawn during or following a prehearing conference or at least 48 hours before the date and the time set for the first hearing, one-third of the fee in excess of $200 will be refunded.

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AAA-5-20M-1/87

4. FORMS AND MODEL ADR PROCEDURES

B. Agency Examples

DEPARTMENT OF THE ARMY EC 27-1-3
US Army Corps of Engineers
DAEN-CCZ Washington, D.C. 20314-1000

Engineer Circular
No. 27-1-3 23 September 1985

EXPIRES 30 SEPTEMBER 1986
Legal Services

ALTERNATE DISPUTE RESOLUTION: MINI-TRIALS

1. Purpose. This circular sets forth guidance for the use of a mini-trial as an alternate dispute resolution procedure in contract appeals. The mini-trial is an alternative to litigation before the Engineer Board of Contract Appeals (ENG BCA) and the Armed Services Board of Contract Appeals (ASBCA). Guidance pertains to case selection and procedures.

2. Applicability. This circular applies to all HQUSACE/OCE elements and all FOA processing contract appeals pending before the ENG BCA or ASBCA.

3. Reference. EFARS Appendix N, "Contract Requests Contract Dispute Claims and Appeals."

4. General.

a. Definition. A mini-trial is a voluntary, expedited, and nonjudicial procedure whereby top management officials for each party meet to resolve disputes.

b. Background. The mini-trial was developed as an alternative to litigation because of the costs, delays and disruptions associated with litigation. Although the term mini-trial has been coined, it is not really a trial. It is a technique used to bring top management officials together voluntarily to resolve disputes in a short period of time rather than relying upon a third party such as a judge to decide the matter. The mini-trial consists of a blend of selected characteristics from the adjudicative process with arbitration, mediation and negotiation. This blend can be structured to meet the particular needs of the parties.

c. Characteristics.

(1) Top Management Involvement. Top management officials for both parties are directly involved as principals in making the decision to resolve the dispute.

(2) Time Period Limited. The time period for the process is short. In most cases it should be completed within two to three months.

(3) Informal Hearing Format. The hearing is informal and in most instances should last only one to two days. Each party has a representative make a presentation to the principals.

(4) Discussions Non-binding. At the conclusion of the hearing, the principals meet by themselves to discuss the dispute. These discussions are non-binding and are kept strictly confidential.

(5) Neutral Advisor Input. A neutral advisor may be retained by the parties to assist in the mini-trial.

5. Case Selection.

a. Initial Determination. The Division Engineer has the authority to select a pending contract appeal for the mini-trial process. This decision may be based upon the request of the appellant.

b. Procedures. Upon receipt of the contract appeal file by the Division Engineer, it will be reviewed by appropriate staff members, including the Division Counsel. When a mini-trial is recommended, the Division Counsel will prepare a report to the Division Engineer setting forth the reasons for the recommendation.

c. Time of Case Selection. The selection of a pending appeal should be made after Division review has been completed so that the facts and issues have been sufficiently developed.

d. Types of Disputes. While most contract appeals are suitable for mini-trials, appeals involving clear legal precedent or having significant precedential value are not appropriate.

6. Initiation of Process.

a. Offer to Appellant. Once the decision has been made that an appeal is appropriate for a mini-trial, the Division Engineer will offer appellant the opportunity to participate in the process. At that time, the Division Counsel should notify the government trial attorney and the Chief Trial Attorney, (DAEN-CCF) that a mini-trial is being offered to appellant. Appellant will be advised that the procedure is voluntary and will not prejudice its appeal before the Board. The Division Engineer will explain the nature of the mini-trial and set forth its basic characteristics and participants. Appellant will also be advised that the parties will have to enter into a written agreement governing the mini-trial procedures.

b. Participants.

(1) Principals.

(a) The Government's principal participant will be the Division Engineer. However, in appropriate circumstances in the discretion of the Division Engineer, the principal participant may be the Deputy Division Engineer. The authority of the Division Engineer to resolve the contract claim shall be set forth in a warrant as the contracting officer for purpose of the mini-trial. The request for a warrant shall be submitted to HQUSACE (DAEN-PR) WASH DC 20314-1000.

(b) The contractor's principal should be a senior management official who has authority to settle the appeal. Further, if possible, the contractor's principal should not have been previously involved with the preparation of the claim or presentation of the appeal.

(2) Representatives. Each party will designate a representative who will act as point of contact and make the mini-trial presentation. The government trial attorney should be the Government representative.

(3) Neutral Advisor. At the option of the parties, a neutral advisor may be used to assist in the mini-trial. The neutral advisor must be an impartial third party with experience in government contracting and litigation.

The Chief Trial Attorney (DAEN-CCF) will maintain a list of neutral advisors. The name of anyone not on the list may be submitted by the Division Counsel for addition to the list.

(c). Mini-Trial Agreement. The Division Counsel, in coordination with the Government trial attorney should negotiate the mini-trial agreement with appellant. The agreement will contain the procedures to be followed during the course of the mini-trial. The agreement must contain specific time limitations to assure that the mini-trial is handled in an expeditious manner. The agreement should be executed by the principals and representatives for both parties. A sample agreement is at Appendix A. However, each mini-trial agreement should be structured to meet the needs of each situation.

(d) Contracting With the Neutral Advisor. The services provided by the neutral advisor are non-personal in nature and therefore the engagement of a neutral advisor may be handled by entering into a non-personal services tripartite contract in compliance with FAR, Part 37, Subpart 37.1. The parties to this tripartite contract will be the Government, the contractor, and the neutral advisor. The contract should, at a minimum, cover the services to be furnished by the neutral advisor; the time for performance of such services (which shall include a "not to exceed" time for the performance of such services); the total price for the services of the neutral advisor with a breakdown of the price to indicate the amount to be paid by the Government and the amount to be paid by the contractor.

(e) Suspension of Board Proceedings. Upon the execution of the mini-trial agreement, the government trial attorney should file a motion to suspend proceedings before the Board of Contract Appeals. Appellant shall be requested to make this a joint motion. The motion should advise the Board that the suspension is for the purpose of conducting a mini-trial and should state the time limitation for completing the mini-trial.

7. Procedures.

a. General. The mini-trial process is flexible and as such the procedures should reflect the needs of the parties considering the time and costs involved.

b. Time Considerations. Since the mini-trial must be conducted in an expeditious manner the schedule set forth in the mini-trial agreement must be strictly adhered to. The agreement must expressly state the time limitations for discovery, the mini-trial presentation and the post-presentation discussions.

c. Discovery. All mini-trial discovery should be on the record. The scope of discovery should be limited by the parties in the agreement. This may include limiting the number and length of both depositions and interrogatories. Discovery should conclude at least two weeks prior to the mini-trial.

d. Pre Mini-Trial Conference.

(1) Timing. At the conclusion of discovery the representatives should confer with the neutral advisor, if any, and arrange for the timely exchange of written submittals.

(2) Written Submittals. The parties may use any type of written submittal which will further the progress of the mini-trial. A position paper, the format and length of which should be specified in the mini-trial agreement, is recommended. The parties should also agree to exchange exhibits and witness lists. Appellant should submit a quantum analysis which identifies the costs associated with issues that will arise during the mini-trial.

e. Mini-Trial.

(1) Location. The site for conducting a mini-trial should be specified in the mini-trial agreement. The cost of the site, if any, should be shared equally by both parties.

(2) Manner of Presentation. The allocation of time during the mini-trial is at the discretion of the parties. The hearing should not exceed two days. The mini-trial agreement should specify the exact time for each presentation and the type of presentation, whether direct or rebuttal. The time limitations should be strictly adhered to. Each representative shall have the discretion to structure its presentation as desired. This may include the examination of witnesses including expert witnesses, audio

visuals, demonstrative evidence and oral argument. Any testimony given shall be unsworn. Furthermore, the recording or verbatim transcription of testimony will not be acceptable. The mini-trial agreement should indicate whether the neutral advisor and opposing representatives or principals will be permitted to examine witnesses. If agreed, a time for such examination should be specified in the agreement. Also, closing statements should be made since post-hearing briefs are not submitted.

(3) Role of the Neutral Advisor. The neutral advisor shall be present at the hearing and provide such services as are specified in the mini-trial agreement, such as the application of the agreement and providing an oral or written opinion on the merits of the claim. The agreement shall provide that the neutral advisor may not be called as a witness in any subsequent litigation concerning the claim. The cost of the neutral advisor shall be shared equally by both parties.

f. Settlement Discussions. The principals should meet immediately following the mini-trial to discuss resolution of the claim. The meeting should be conducted privately, but the mini-trial agreement may provide for the principals to consult with the neutral advisor. Also a principal may consult with staff members. Any additional examination of witnesses or argument by representatives shall be conducted in the presence of both principals and, if applicable, the neutral advisor.

g. Confidentiality. The advice of the neutral advisor, if any, and the discussions between the principals shall not be used in any subsequent litigation as an indication or admission of liability or to indicate what either party was willing to agree to as a part of the settlement discussions.

h. Termination. Since the mini-trial is a voluntary process, either principal may terminate the mini-trial agreement at any time.

8. Notification. When a mini-trial is initiated the Chief Trial Attorney (DAEN-CCF) must be notified in writing. Such notification should include a copy of the Division Counsel's report to the Division Engineer and a copy of the mini-trial agreement.

FOR THE COMMANDER:

Lester Edelman

LESTER EDELMAN
Chief Counsel

1 Appendix:
App A - Sample
Mini-Trial Agreement

APPENDIX A

MINI-TRIAL AGREEMENT
BETWEEN THE
UNITED STATES ARMY CORPS OF ENGINEERS
AND
APPELLANT

This mini-trial agreement dated this _____ day of _________, 19____ is executed by ____________________________, Division Engineer, United States Army Corps of Engineers on behalf of the Corps, and by _________________________, on behalf of _____________________________________ hereinafter referred to as ______________________________.

WHEREAS: On the ____ day of ______________, 19____, the parties hereto entered into Contract No. __________________ for the ____ ____________________________________;

WHEREAS, under the Disputes Clause (General Provision No. 4) of that contract, Appellant on ____________ ____, 19____ filed a claim with the contracting officer alleging ________ ____ ____ ____;

WHEREAS, Appellant certified its claim in accordance with the requirements of the Contract Disputes Act of 1978;

WHEREAS, in a letter dated ____________ ____, 19______ the contracting officer issued a final decision denying appellant's claim;

WHEREAS, on ___________ _____, 19____ Appellant appealed the contracting officer's final decision to the ________________ Board of Contract Appeals where the appeal has been docketed as (ASBCA) (ENG BCA) No. ________;

WHEREAS, the Corps has instituted an Alternative Contract Disputes Resolution Procedure known as a "Mini-Trial", which procedure provides the parties with a voluntary means of attempting to resolve disputes without the necessity of a lengthy and costly proceeding before a Board of Contract Appeals nor prejudicing such proceeding; and

WHEREAS, the Corps and Appellant have agreed to submit (ASBCA) (ENG BCA) No._________ to a "Mini-Trial".

NOW THEREFORE, subject to the terms and conditions of this "Mini-Trial" agreement, the parties mutually agree as follows:

1. The Corps and Appellant will voluntarily engage in a non-binding mini-trial on the issue of ____________________

____

____.

The mini-trial will be held on ___________ ____, 19 ____

at ____________________ ____________________.

2. The purpose of this mini-trial is to inform the principal participants of the position of each party on the claim and the underlying bases of such. It is agreed that each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum.

3. The principal participants for the purpose of this mini-trial will be ______________________________ for the Corps, and ________________________ for appellant. The principal participants have the authority to settle the dispute. Each party will present its position to the

principal participants through a trial attorney(s). In addition, ________________ will attend as a mutually selected "neutral advisor".

4. The role of the neutral advisor is that of an advisor. The neutral advisor will not be actively involved in the conduct of the mini-trial proceedings. The neutral advisor may ask questions of witnesses only if mutually agreed to by the principal participants. Upon request by either principal the neutral advisor will provide comments as to the relative strengths and weaknesses of that party's position.

5. The Government trial attorney will provide the neutral advisor with copies of this agreement and the Rule 4 appeal assembly. Other source materials, statements, exhibits and depositions may be provided to the neutral advisor by the trial attorneys, but only after providing the same materials to the other trial attorney. Neither trial attorney shall conduct ex parte communications with the neutral advisor.

6. The fees and expenses of the neutral advisor shall be borne equally by both parties. Except for the costs of the neutral advisor, all costs incurred by either party in connection with the mini-trial proceedings shall be borne by that party, and shall not be treated as legal costs for apportionment in the event that the dispute is not resolved, and proceeds to a Court or Board determination.

7. Unless completed prior to the execution of this agreement, the parties will enter into a stipulation setting forth a schedule for discovery to be taken and completed ______ weeks prior to the mini-trial. Discovery taken during the period prior to the mini-trial shall be admissible for all purposed in this litigation, including any subsequent hearing before any Board or competent authority in the event this mini-trial does not result in a resolution of this appeal. It is agreed that the pursuit of discovery during the period prior to the mini-trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the mini-trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In such case the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual into the same or additional subject matter for a later hearing date before a Court or Board.

8. No later than _____ weeks prior to commencement of the mini-trial, ________________________________ shall submit to the Corps a quantum analysis which identifies the costs associated with the issues that will arise during the mini-trial.

9. The presentations at the mini-trial will be informal. The rules of evidence will not apply, and witnesses may provide testimony in the narrative. The principal participants may ask any question of the witnesses that they deem appropriate. However, any such questioning by the principals shall be within the time period allowed for that parties' presentation of its case as hereinafter delineated in paragraph 10.

10. At the mini-trial proceeding, the trial attorneys have the discretion to structure its presentation as desired. The form of presentation may be through expert witnesses, audio visual aids, demonstrative evidence, depositions and oral argument. The parties agree that stipulations will be utilized to the maximum extent possible. Any complete or partial depositions taken in connection with the litigation in general, or in contemplation of the mini-trial proceedings, may be introduced at the mini-trial as information to assist the principal participants understanding of the various aspects of the parties' respective positions. The parties may use any type of written material which will further the progress of the mini-trial. The parties may, if desired, no later than __________ weeks prior to commencement of the mini-trial, submit to the representatives for the opposing side, as well as the neutral advisor, a position paper of

no more than 25 - 8-1/2 X 11 double spaced pages. No later than _____ week(s) prior to commencement of the proceedings, the parties will exchange copies of all documentary evidence proposed for utilization at the mini-trial, inclusive of a listing of all witnesses.

11. The mini-trial proceedings shall take ________ day(s). The morning's proceedings shall begin at ____ a.m. and shall continue until ______ a.m. The afternoon's proceedings shall begin at ______ p.m. and continue until ____ p.m. (A sample two day schedule follows:)

EC 27-1-3
23 SEP 85

SCHEDULE

Day 1

8:30 a.m. - 12:00 Noon	Appellant's position & case presentation.
12:00 Noon - 1:00 p.m.	Lunch*
1:00 p.m. - 2:30 p.m.	Corps' cross-examination.
2:30 p.m. - 4:00 p.m.	Appellant's re-examination.
4:00 p.m. - 5:00 p.m.	Open question & answer period.

Day 2

8:30 a.m. - 12:00 Noon	Corps' position & case presentation.
12:00 Noon - 1:00 p.m.	Lunch*
1:00 p.m. - 2:30 p.m.	Appellant's cross-examination.
2:30 p.m. - 3:00 p.m.	Corps' re-examination.
3:00 p.m. - 4:30 p.m.	Open question and answer period.
4:30 p.m. - 4:45 p.m.	Appellant's closing argument.
4:45 p.m. - 5:00 p.m.	Corps' closing argument.

*Flexible time period for lunch of a stated duration.

11. Within _______ day(s) following the termination of the mini-trial proceedings, the principal participants should meet, or confer, as often as they shall mutually agree might be productive for resolution of the dispute. If the parties are unable to resolve the dispute within ___ days following completion of the mini-trial, the mini-trial process shall be deemed terminated and the litigation will continue.

12. No transcript or recording shall be made of the mini-trial proceedings. Except for discovery undertaken in connection with this appeal, all aspects of the mini-trial including, without limitation, all written material prepared specifically for utilization at the mini-trial, or oral presentations made, between or among the parties and/or the advisor at the mini-trial are confidential to all persons, and are inadmissible as evidence, whether or not for purposes of impeachment, in any pending or future Court or Board action which directly or indirectly involves the parties and this matter in dispute. However, if settlement is reached as a result of the mini-trial, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement modification. Furthermore, evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the mini-trial.

13. The neutral advisor will be instructed to treat the subject matter of this proceeding as confidential, and refrain from disclosing any of the information exchanged to third parties. The neutral advisor is disqualified as a witness, consultant or expert for either party in this and any other dispute between the parties arising out of performance of Contract No.______________________________.

14. Each party has the right to terminate the mini-trial at any time for any reason whatsoever.

15. Upon execution of this mini-trial agreement, if mutually deemed advisable by the parties, the Corps and Appellant shall file a joint motion to suspend proceedings of this appeal before the _______________ Board of Contract Appeals. The motion shall advise the Board that the suspension is for the purpose of conducting a mini-trial. The Board will be advised as to the time schedule established for completing the mini-trial proceedings.

DATED ____________________	DATED __________________
BY: _________________________	BY: _____________________
Principal participant for Corps	Principal participant for
_______________________________	_________________________
Attorney for the Corps	Attorney for Appellant

NOTE: This agreement reflects a mini-trial which involves a neutral advisor. In the event a neutral advisor is not used, you should eliminate all references to the neutral advisor.

DEPARTMENT OF THE ARMY
SOUTH ATLANTIC DIVISION, CORPS OF ENGINEERS
510 TITLE BUILDING, 30 PRYOR STREET, S.W.
ATLANTA, GEORGIA 30335-6801

REPLY TO
ATTENTION OF:

SADOC

6 MAY 1986

SUBJECT: Implementation of Alternative Contract Disputes Resolution Procedure

Commander, Wilmington District
Commander, Charleston District
Commander, Savannah District
Commander, Jacksonville District
Commander, Mobile District

1. Forwarded are draft procedures for an alternative disputes resolution process which were developed by SAD. I support the concept, and have advised the Chief of Engineers that the procedure will be implemented by the SAD Districts. I have further proposed that the procedure be implemented Corps-wide.

2. The mediation disputes resolution process concept should be utilized by your district in order to attempt to resolve contract disputes early on during construction. The procedures set forth are draft, and following a test period as described below, and receipt of comments and suggestions from each SAD District, the procedures and guidelines will be finalized. During this test period, however, you should attempt to follow the mediation guidelines to the maximum extent practicable, but with latitude to modify the procedures depending upon the circumstances of each case.

3. The procedures have been informally discussed within SAD counsel channels and the following is further guidance regarding certain issues and concerns which have been raised:

a. Site visits by the Board. It is not required that for every contract a Disputes Resolution Board be established, and when established the number and extent of site visits is discretionary. For example, on large projects with substantial excavation and potential craft coordination problems, it may be advisable to have members of the Board visit the project site early on, and to periodically observe construction progress. On other projects, such as dredging, site visits by the Board would most likely be non-productive. The extent to which a Board is utilized in this regard is discretionary to the district. Constituting a Disputes Resolution Board at the initiation of construction is also

6 MAY 1986

SADOC
SUBJECT: Implementation of Alternative Contract Disputes Resolution Procedure

discretionary. However, contacting individuals to determine their availability and interest in serving on a Disputes Resolution Board and entering into an agreement, would require the expenditure of minor time and resources. Board expenses would not occur until their services were actually utilized.

b. Qualification of Board members. A list of names of suitable Disputes Resolution Board members will be developed. During this initial test period each district, following coordination with SAD technical and legal staff, is to contact and enter into agreements with individuals they feel would be suitable Board members. Such individuals selected, however, should meet the requirement of Section 5 of the Draft EC, and furthermore, should have technical (as opposed to legal) background and experience.

c. Admissability of Board evidence and proceedings. This is a controversial issue which has yet to be resolved. The proposed guidelines state that information generated as a result of the Disputes Resolution Board proceedings will be admissible in any subsequent court or Board litigation. Final decision on this issue will follow the test period and receipt of district input on the procedure.

4. I would request that you implement the mediation disputes resolution process for a one year test period from 1 May 1986 through 31 March 1987. I would further request that you provide me by 1 June 1987 a report detailing your experiences with the procedures, and any recommended changes/modification which you feel would improve the process.

Enclosure

C. E. EDGAR III
Brigadier General, USA
Commanding

SPECIAL PROVISION

ALTERNATIVE DISPUTES REVIEW PROCESS

In order to assist in the resolution of disputes or claims arising out of this project, this contract clause establishes an Alternative Disputes Review process. A Disputes Review Board is being added to the disputes resolution process to be brought into play by mutual agreement of the parties when normal Government Contractor dispute resolution is unsuccessful. The Disputes Review Board will consider disputes referred to it and will provide non-binding recommendations to assist in the resolution of the differences between the Government and Contractor. The following alternative procedure may be used for dispute resolution. Specific procedures to be followed for disputes referred to the Disputes Review Board are set forth at Corps of Engineer Circular No._____.

1. If the Contractor objects to any oral decision or order of the Contracting officer, the Contractor shall request in writing a written decision or order from the Contracting Officer.

2. After receipt of the Contracting Officer's written decision or order the Contractor shall, if he objects to such decision or order, file a written protest with the Contracting Officer, stating clearly and in detail the basis of the objection. The Contracting Officer will consider any written protest and make his preliminary Contracting Officer's decision on the basis of the pertinent contract provisions and facts and circumstances involved in the dispute. Should the Contractor object to the Contracting Officer's preliminary

decision, the matter can either be referred to the Disputes Review Board by mutual agreement of the Government and the Contractor, or the Contractor may request that the Contracting Officer issue a final decision on the matter, from which the contractor may pursue an appeal in accordance with the "Disputes" clause of the contract.

3. In the event the Government and the Contractor mutually agree to submit the dispute to the Disputes Review Board, the request for review must be instituted within 30 days of the date of receipt of the Contracting Officer's preliminary decision. Pending review by the Disputes Review Board of a dispute, the Contractor shall diligently proceed with the work as previously directed.

4. The Contractor and the Government shall each be afforded an opportunity to be heard by the Disputes Review Board and to offer evidence. The Disputes Review Board recommendations toward resolution of a dispute will be given in writing to both the Government and the Contractor within 30 days following conclusion of the proceedings before the Disputes Review Board.

5. Within 30 days of receiving the Dispute Review Board's recommendations, both the Government and the Contractor shall respond to the other in writing signifying that the dispute is either resolved or remains unresolved. If the Government and the Contractor are able to resolve their dispute, the Government will expeditiously process any required contract modifications. Should the dispute remain unresolved after 30 days following receipt of the Board's recommendations, the Contracting Officer will issue his final decision on the matter in dispute, and the contractor will be entitled to pursue an appeal in accordance with the "Disputes" clause of the contract.

ALTERNATIVE DISPUTES REVIEW PROCESS

EC____________

DISPUTES REVIEW BOARD

1. Purpose. The Disputes Review Board is an advisory body which may be created by mutual agreement of the Government and the Contractor for a particular construction project. The Board's function will be to assist in the resolution of claims, disputes or controversy between the Contractor and the Government. Any recommendations made by the Board will be advisory, and will not be binding upon either party.

2. Applicability. This circular applies to all HQ USACE/OCE elements and all FOA processing contract appeals pending before the ENG BCA or ASBCA.

3. Reference. EFARS Appendix N, "Contract Requests, Contract Disputes Claims and Appeals".

4. General.

a. Definition. The Disputes Review Board process is a voluntary, expedited and non-judicial and non-binding mediation procedure, whereby an independent three-party Board is established to evaluate contract disputes and provide recommendations to the Corps and its contractor with the objective of resolving disputes.

b. The Board will consider disputes referred to it, and will furnish recommendations to the Government and Contractor to assist in the resolution of the differences between them. The Board will essentially be acting in the role of mediator, providing special expertise to assist and facilitate the resolution of disputes.

5. Board Membership.

a. The Disputes Review Board shall consist of one member selected by the Government and one member selected by the Contractor. The first two members shall be mutually acceptable to both the Government and the Contractor. The parties shall exchange lists of three individuals acceptable as a Board member. The Corps and the Contractor shall each select one individual from the other's list. If no individual on the first list is acceptable to the other party, a second list with three individuals will be proposed. If no one on the second list is acceptable to the other party, the selection process shall not continue and the mutual decision to submit the dispute to a Disputes Review Board shall be considered terminated.

b. The two members acceptable to the Government and the Contractor will independently select the third member from a list of 20 names developed by the Government of individuals respected in the field of engineering for their ability and integrity, one of whom should be acceptable. If the two members are unable to select the third member from this list, the decision to submit the dispute to a Disputes Review Board shall be considered terminated.

c. No member shall have a financial interest in the contract, except for payment for services on the Disputes Review Board. Except for fee-based consulting services on other projects, no Board member shall have been employed by either party within a period of two years prior to award of the contract.

6. Selection of the Disputes Review Board Procedure.

If the parties mutually agree that a Disputes Review Board should be established for work performed under a contract, the Government and the Contractor shall negotiate an agreement with their member within 60 calendar days after execution of the contract. The selection of the Disputes Review Board Alternative Disputes Review procedure for resolution of contract disputes shall be void if the two members are unable to select a third member within 30 calendar days.

7. Procedure for Submitting a Dispute to the Board.

a. If the Contractor objects to any oral decision or order of the Contracting Officer, the Contractor shall request in writing a written decision or order from the Contracting Officer.

b. After receipt of the Contracting Officer's written decision or order the Contractor shall, if he objects to such decision or order, file a written protest with the Contracting Officer, stating clearly and in detail the basis of the objection. The Contracting Officer will consider any written protest and make his preliminary Contracting Officer's decision on the basis of the pertinent contract provisions and facts and circumstances involved in the dispute. Should the Contractor object to the Contracting Officer's preliminary decision, the matter can either be referred to the Disputes Review Board by mutual agreement of the Government and the Contractor, or the Contractor may request that the Contracting Officer issue a final decision on the matter, from which the Contractor may pursue an appeal in accordance with the "Disputes" clause of the contract.

c. In the event the Government and Contractor mutually agree to submit the dispute to the Disputes Review Board, the request for review must be instituted within 30 days of the date of receipt of the Contracting Officer's preliminary decision. Pending review of the Disputes Review Board of a dispute, the Contractor shall diligently proceed with the work as previously directed.

d. The Contractor and the Government shall each be afforded an opportunity to be heard by the Disputes Review Board and to offer evidence. The Disputes Review Board shall submit in writing recommendations towards factual (as opposed to legal) resolution of a dispute to both the Government and the Contractor within 30 days following conclusion of the proceedings before the Disputes Review Board.

e. Within 30 days of receiving the Dispute Review Board's factual recommendations, both the Government and the Contractor shall respond to the other in writing signifying that the dispute is either resolved or remains unresolved. If the Government and the Contractor are able to resolve their dispute, the Government will expeditiously process any required contract modifications. Should the dispute remain unresolved after 30 days following receipt of the Board's recommendations, the Contracting Officer will issue his final decision on the matter in dispute, and the contractor will be entitled to pursue an appeal in accordance with the "Disputes" clause of the contract.

f. In appropriate cases the Contractor and the Government may agree that a dispute should be submitted to the Disputes Review Board, but that the dispute only warrants the mediation efforts of one Board Member. In such cases the third Board Member will mediate the dispute without participation of the other two members. Other than submitting the dispute to only the third Board Member, the procedural requirements of the Alternative Disputes Review Board Process as set forth in paragraph 7a-e above will be followed.

8. Board Procedures.

a. The Disputes Review Board will formulate its own rules of operation. In order to keep abreast of construction progress, it is recommended that the members, as a Board, will visit the project at least quarterly, keep a current file and regularly meet with representatives of the Government and the Contractor. More frequent than quarterly site visits shall be as agreed between the Government, the Contractor and the Board.

b. Should the need arise to appoint a replacement Board member, the replacement member shall be appointed in the same manner as the original Board members were appointed. The selection of a replacement Board member shall begin promptly upon notification of the necessity for a replacement, and shall be completed within 30 calendar days. The Disputes Board Three Party Agreement will be supplemented to indicate changes in Board membership.

c. For further description of work, responsibilities and duties of the Disputes Review Board, and the Government and Contractor's obligations and responsibilities with respect to each other and to the Disputes Review Board, see the "Disputes Board Three Party Agreement" as set forth in Appendix "A" hereto.

9. Expenses of the Board and Board Members.

Compensation for the Disputes Review Board members, and the expenses of operation of the Board, shall be shared by the Government and Contractor in accordance with the following:

a. The Government will compensate directly the wages and travel expense for its selected member.

b. The Contractor shall compensate directly the wages and travel expense for its member.

c. The Government and Contractor will share equally in the third member's wages and travel, and all other expenses of the Board.

d. The Government at its expense will provide administrative services, such as conference facilities and secretarial services, to the Board.

10. Three Party Agreement.

a. The Contractor, the Government and all three members of the Board shall execute the "Disputes Review Board Three Party Agreement" within 30 calendar days following the final selection of third member.

b. The "Disputes Review Board Three Party Agreement" and the "Disputes Review Board Guidelines" to said Agreement are set forth below.

In the United States Claims Court

GENERAL ORDER NO. 13

The United States Claims Court is sensitive to rising litigation costs and the delay often inherent in the traditional judicial resolution of complex legal claims. While the mandates of due process inevitably place limits on how expeditious a trial of a complex issue can be, there are no such limits when parties voluntarily seek noncompulsory settlements. Since justice delayed is justice denied, it is an obligation of this court to further the settlement process in all ways consistent with the ultimate guarantee of a fair and complete hearing to those disputes that cannot be resolved by mutual consent. Courts are institutions of last resort and while preserving that "last resort" as a sacred trust, they should insure its use only when other methods of dispute resolution have failed. In response to these concerns, the court is implementing two methods of **Alternative Dispute Resolution:** *Settlement Judges and Mini-Trials*. The methods to be used in the Claims Court are described in the "Notice to Counsel" attached to this Order.

IT IS ORDERED, effective this date, that the Notice to Counsel shall be distributed as follows:

(1) to counsel for all parties in cases currently pending before the Claims Court, and

(2) to counsel for all parties in cases filed after the date of this Order.

April 15, 1987

BY THE COURT

Loren A. Smith

LOREN A. SMITH
Chief Judge

NOTICE TO COUNSEL

Alternative Dispute Resolution Techniques

In response to rising litigation costs and the delay often inherent in the traditional judicial resolution of complex legal claims, the United States Claims Court is implementing two methods of alternative dispute resolution (ADR) for use in appropriate cases. The Claims Court encourages all reasonable avenues toward settlement of disputes, including the usual dialogue between the trial judge and counsel. Implementation by the court of these ADR methods does not preclude use by the parties of other ADR techniques which do not require court involvement.

The ADR methods outlined below are both voluntary and flexible, and should be employed early in the litigation process in order to minimize discovery. Both parties must agree to use the procedures. Because these procedures are designed to promote settlement and involve the application of judicial resources, however, the court views their use as most appropriate where the parties anticipate a lengthy discovery period followed by a protracted trial. These requirements typically will be met where the amount in controversy is greater than $100,000 and trial is expected to last more than one week.

When both counsel agree and wish to employ one of the ADR methods offered, they should notify the presiding judge of their intent as early as possible in the proceedings, or concurrently with submission of the Joint Preliminary Status Report required by Appendix G. The presiding judge will consider counsels' request and make the final decision whether to refer the case to ADR. If ADR is considered appropriate, the presiding judge will refer the case to the Office of the Clerk for assignment to a Claims Court judge who will preside over the ADR procedure adopted. The ADR judge will exercise ultimate authority over the form and function of each method within the general guidelines adopted by the court. Accordingly, the parties will promptly meet with the assigned ADR judge to establish a schedule and procedures for the technique chosen. Should either of these techniques fail to produce a satisfactory settlement, the case will be returned to the presiding judge's docket. Except as allowed by Federal Rule of Evidence 408, all representations made in the course of the selected ADR proceeding are confidential and may not be used for any reason in subsequent litigation.

I. Settlement Judge

In many circumstances, settlement can be fostered by a frank, in-depth discussion of the strengths and weaknesses of each party's case before a neutral advisor. Although this alternative can be used successfully at any stage of the litigation, it is suggested that it be adopted as early in the process as feasible to eliminate unnecessary cost and delay. Moreover, the agenda for these meetings with the settlement judge should remain flexible to accommodate the requirements of the individual cases. Through this ADR method, the parties will gain the benefit of a judicial assessment of their settlement positions, without jeopardizing their ability to obtain an "impartial" resolution of their case by the presiding judge should settlement not be reached.

II. Mini-Trial

The mini-trial is a highly flexible, expedited procedure where each party presents an abbreviated version of its case to a neutral advisor (a judge other than the presiding judge), who then assists the parties to negotiate a settlement. Because the mini-trial similarly is designed to eliminate unnecessary cost and delay, it should be adopted before extensive discovery commences. This ADR technique, however, should be employed only in those cases which involve factual disputes and are governed by well-established principles of law. Cases which present novel issues of law or where witness credibility is a major factor are handled more effectively by traditional judicial methods.

Although the procedures for each mini-trial should be designed to meet the needs of the individual case, the following guidelines are appropriate in most circumstances:

(a) Time Frame - The mini-trial should be governed by strict time limitations. The entire process, including discovery and trial, should conclude within one to three months.

(b) Participants - Each party should be represented by an individual with authority to make a final recommendation as to settlement and may be represented by counsel. The participation of senior management/agency officials (principals) with first-hand knowledge of the underlying dispute is highly recommended.

(c) Discovery - Any discovery conducted should be expedited, limited in scope where feasible, and scheduled to conclude at least two weeks prior to the mini-trial. Counsel bear a special responsibility to conduct discovery expeditiously and voluntarily in a mini-trial situation.

Any discovery disputes which the parties cannot resolve will be handled by the mini-trial judge. Discovery taken for the purpose of the mini-trial may be used in further judicial proceedings if settlement is not achieved.

(d) Pre-Hearing Matters - At the close of discovery, the parties should meet with the mini-trial judge for a pre-hearing conference. The parties normally should provide for exchange of brief written submittals summarizing the parties' positions and narrowing the issues in advance of the hearing. The submittal should include a discussion of both entitlement and damages. Contemporaneously with the exchange of the written submittals, the parties should finalize any stipulations needed for the hearing and, where applicable, exchange witness lists and exhibits. The parties also should establish final procedures for the hearing.

(e) Hearing - The hearing itself is informal and should generally not exceed one day. The parties may structure their case to include examination of witnesses, the use of demonstrative evidence, and oral argument by counsel. Because the rules of evidence and procedure will not apply, witnesses will be permitted to relate their testimony in the narrative, objections will not be permitted, and a transcript of the hearing will not be made. The role of the mini-trial judge similarly is flexible and may provide for active questioning of witnesses. Each party should present a closing statement to facilitate the post-hearing settlement discussions.

(f) Post-Hearing Settlement Discussions - At the conclusion of the informal hearing, the principals and/or counsel meet to discuss resolution of the dispute. The mini-trial judge may play an active role in the discussions, or be available to render an advisory opinion concerning the merits of the claim.

III. Comment

The court welcomes further input from the bar and general public on this Notice to Counsel and General Order No. 13. This input will be considered, along with the initial practical experience under the Order in a continuing effort to further the effective administration of justice.

U. S. CLAIMS COURT

NEWS RELEASE

For Further Information Contact
Gary Golkiewicz at
(202) 633-7252

FOR RELEASE APRIL 15, 1987

U.S. CLAIMS COURT IMPLEMENTS ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES

WASHINGTON, D.C., APRIL 15, 1987. Chief Judge Loren A. Smith of the U.S. Claims Court announced today that the Claims Court is implementing two forms of Alternative Dispute Resolution.

The Claims Court will utilize the voluntary Settlement Judge and Mini-Trial procedures. Parties may elect to use Settlement Judges where it is possible that resolution of a dispute may be achieved through frank discussion of a case's strengths and weaknesses before a neutral advisor (a judge other than the presiding judge). A Mini-Trial is a flexible, expedited procedure where each side presents an abbreviated version of its case to a neutral advisor who then assists in negotiation of a settlement. In the event these procedures do not result in settlement, the case will be returned to the presiding judge's docket for trial.

The procedures are the product of the Alternative Dispute Resolution Committee of the U.S. Claims Court Advisory Council. The Alternate Dispute Resolution Committee, chaired by Judge Lawrence S. Margolis, is composed of Claims Court Judges, government attorneys, and attorneys in private practice. According to Judge Margolis, the Claims Court is sensitive to the widespread concern over rising litigation costs and crowded court dockets and realizes that action is necessary to help expedite case resolution whenever possible. The new procedures will be available for use in all cases currently pending before the Claims Court, as well as cases filed in the future.

For further information, contact Gary J. Golkiewicz at (202) 633-7252.

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GUIDANCE ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN EPA ENFORCEMENT CASES

United States Environmental Protection Agency

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GUIDANCE ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN EPA ENFORCEMENT CASES

I. INTRODUCTION

In order to effect compliance with the nation's environmental laws, the United States Environmental Protection Agency (EPA) has developed and maintained a vigorous judicial and administrative enforcement program. Cases instituted under the program must be resolved, either through settlement or decision by the appropriate authority, as rapidly as possible in order to maintain the integrity and credibility of the program, and to reduce the backlog of cases.

Traditionally, the Agency's enforcement cases have been settled through negotiations solely between representatives of the Government and the alleged violator. With a 95 percent success rate, this negotiation process has proved effective, and will continue to be used in most of the Agency's cases. Nevertheless, other means of reaching resolution, known collectively as alternative dispute resolution (ADR), have evolved. Long accepted and used in commercial, domestic, and labor disputes, ADR techniques, such as arbitration and mediation, are adaptable to environmental enforcement disputes. These ADR procedures hold the promise for resolution of some of EPA's enforcement cases in a manner more efficient than but as effective as those used in traditional enforcement. Furthermore, ADR provisions can be incorporated into judicial consent decrees and consent agreements ordered by administrative law judges to address future disputes.

EPA does not mean to indicate that by endorsing the use of ADR in its enforcement actions, it is backing away from a strong enforcement position. On the contrary, the Agency views ADR as merely another tool in its arsenal for the achievement of compliance. EPA intends to use the ADR process, where appropriate, to resolve enforcement actions with outcomes similar to those the Agency reaches through litigation and negotiation. As ADR is composed only of processes, use of any such mechanisms does not lead inevitably to more lenient results for violators; rather, ADR should take EPA to its desired ends by alternate means.

ADR is increasingly becoming accepted by many federal agencies, private citizens, and organizations as a method of handling disputes. The Administrative Conference of the United States has repeatedly called for federal agencies to make greater use of ADR techniques, and has sponsored numerous studies to further their use by the federal government. The Attorney General of the United States has stated that it is the policy of the United States to use ADR. By memorandum, dated February 2, 1987, the Administrator of EPA endorsed the concept in enforcement disputes, and urged senior Agency officials to nominate appropriate cases.

This guidance seeks to:

(1) Establish Policy - establish that it is EPA policy to utilize ADR in the resolution of all or portions of appropriate enforcement cases.

(2) Describe Methods - describe some of the applicable types of ADR, and the characteristics of cases which might call for the use of ADR;

(3) Formulate Case Selection Procedures - formulate procedures for determining whether to use ADR in particular cases, and for selection and procurement of a "third-party neutral" (i.e., mediators, arbitrators, or others employed in the use of ADR);

(4) Establish Qualifications - establish qualifications for third-party neutrals; and

(5) Formulate Case Management Procedures - formulate procedures for management of cases in which some or all issues are submitted for ADR.

II. ALTERNATIVE DISPUTE RESOLUTION METHODS

ADR mechanisms which are potentially useful in environmental enforcement cases will primarily be mediation and arbitration. Fact-finding and mini-trials may also be helpful in a number of cases. A general description of these mechanisms follows. (See also Section VIII, below, which describes in greater detail how each of these techniques works.) Many other forms of ADR exist, none of which are precluded by this guidance. Regardless of the technique employed, ADR can be used to resolve any or all of the issues presented by a case.

A. Mediation[1] is the facilitation of negotiations by a person not a party to the dispute (herein "third-party neutral") who has no power to decide the issues, but whose function is to assist the parties in reaching settlement. The mediator serves to schedule and structure negotiations, acts as a catalyst between the parties, focuses the discussions, facilitates exchange between the parties, and serves as an assessor - but not a judge - of the positions taken by the parties during the course of negotiations. With the parties' consent, the mediator may take on additional functions such as proposing solutions to the problem. Nevertheless, as in traditional negotiation, the parties retain the power to resolve the issues through an informal, voluntary process, in order to reach a mutually acceptable agreement. Having agreed to a mediated settlement, parties can then make the results binding.

B. Arbitration involves the use of a person -- not a party to the dispute -- to hear stipulated issues pursuant to procedures specified by the parties. Depending upon the agreement of the parties and any legal constraints against entering into binding arbitration, the decision of the arbitrator may or may not be binding. All or a portion of the issues -- whether factual, legal or remedial -- may be submitted to the arbitrator. Because arbitration is less formal than a courtroom proceeding, parties can agree to relax rules of evidence and utilize other time-saving devices. The Government, however, is currently restricted by law to use binding arbitration only for factual issues.

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[1] For further information on the mediation role of Clean Sites Inc., see the Administrator's guidance on the "Role of Clean Sites Inc. at Superfund Sites."

C. Fact-finding entails the investigation of specified issues by a neutral with subject matter expertise, and selected by the parties to the dispute. The process may be binding or nonbinding, but if the parties agree, the material presented by the fact-finder may be admissible as an established fact in a subsequent judicial or administrative hearing, or determinative of the issues presented. As an essentially investigatory process, fact-finding employs informal procedures. Because this ADR mechanism seeks to narrow factual or technical issues in dispute, fact-finding usually results in a report, testimony, or established fact which may be admitted as evidence, or in a binding or advisory opinion.

D. Mini-trials permit the parties to present their case, or an agreed upon portion of it, to principals who have authority to settle the dispute (e.g., vice-president of a company and a senior EPA official) and, in some cases as agreed by the parties, to a neutral third-party advisor. Limited discovery and preparation precede the case presentation. The presentation itself may be summary or an abbreviated hearing with testimony and cross-examination as the parties agree. Following the presentation, the principals reinstitute negotiations, possibly with the aid of the neutral as mediator. The principals are the decisionmakers while the third-party neutral, who usually has specialized subject matter expertise in trial procedures and evidence, acts as an advisor on potential rulings on issues if the dispute were to proceed to trial. This ADR mechanism is useful in narrowing factual issues or mixed questions of law and fact, and in giving the principals a realistic view of the strengths and weaknesses of their cases.

III. CHARACTERISTICS OF ENFORCEMENT CASES SUITABLE FOR ADR

This section provides characteristics and examples which enforcement personnel can consider to make a preliminary determination of whether ADR may be useful in a dispute. The review should include matters which have not yet been referred for formal judicial or administrative enforcement action as well as matters already on the judicial or administrative docket. Because of the threat of referral, ADR may prove most effective in the pre-litigation phase of a case. Final determinations regarding the use of ADR in a particular case will require a more detailed examination of the facts specific to the dispute. Of course, the Agency will always litigate a narrow category of cases, such as those involving constitutional or statutory challenges and precedential legal issues.

The parties can agree at any point during the course of an action to use ADR. Because expeditious resolution of a portion of a case may make the remainder of the enforcement action more manageable for litigation or negotiation, the characteristics also apply to selected issues comprising a particular dispute.

The characteristics in the accompanying charts are not intended to be exhaustive of the opportunities for ADR, as flexibility is the mainstay of ADR. Agency personnel should rely on their own experience and judgment to evaluate their caseload for potential applications of ADR. Further, there must be a mutual interest by the parties in resolution of some or all of the issues in the case. In all instances where the parties demonstrate a willingness to use ADR, the Agency should strongly consider its use.

The characteristics fall naturally into two categories and are therefore, displayed on two separate charts on the following two pages: (1) those applicable to nonbinding ADR mechanisms such as mediation, and (2) those applicable to binding ADR mechanisms such as arbitration.

A. Examples of Nonbinding ADR

1. Impasse

The impasse characteristics on the nonbinding ADR chart are particularly applicable for mediation, mini-trials, and nonbinding (advisory) arbitration or fact-finding. Superfund cases will, in many cases, meet characteristics (1)-(7) or (9), and especially (2), (3) and (6). A CERCLA case with parties including multiple Potentially Responsible Parties (PRPs) that have differing positions, or state and local authorities, offers an excellent opportunity for ADR pursuant to the impasse characteristic.

Regulatory actions, as opposed to Superfund actions, such as those in the water, air, toxics or pesticides programs, are more likely to fit within the impasse characteristics (1) or

Charateristics for Nonbinding ADR

Impasse

Characteristic - The parties have reached, or anticipate reaching, a negotiation impasse because of:

(1) Personality conflicts among negotiators;

(2) Poor communication or co-ordination between parties;

(3) Procedural difficulties due to multiple plaintiffs or defendants with conflicting agendas;

(4) Inflexible negotiating postures which render a case self-perpetuating;

(5) Parties or issues with a history of intransigence;

(6) Procedural difficulties due to very high compliance costs or penalties;

(7) High visibility concerns making it difficult for the parties to settle for fear of losing face, including particularly sensitive environmental concerns such as national parks or wild and scenic rivers, issues of national significance with political implications such as acid rain, or significant adverse employment implications;

(8) Sophisticated technical circumstances leading to a myriad of factual disputes where EPA does not have the ultimate statutory authority to decide such issues (e.g., not CERCLA); or

(9) Any other reasons slowing or halting progress in the settlement of the action.

Level of Resources

Characteristic - The resolution of the dispute would require an excessive expenditure of government resources so that it would be significantly more cost-and time-efficient to use a third-party neutral to resolve all or parts of the case on terms acceptable to the Government. Situations in which ADR may be a better use of resources include those:

(1) With a large number of parties, including not only multiple violators but state and local authorities;

(2) With a large number of issues; or

(3) Where the issues are complex, divisive or controversial.

Remedies Requiring Parties Not Liable for Prosecution

Characteristic - The resolution of the underlying environmental problem requires the involvement of persons or entities not parties to the lawsuit such as a state or local authority.

Characteristics for Binding ADR

Impasse

a. Characteristic - The parties have reached, or anticipate reaching, a negotiation or litigation impasse because of:

(1) Parties or issues with a history of intransigence;

(2) Sophisticated technical circumstances leading to a myriad of factual disputes or remedies involving technologies which are difficult to implement or are not readily available, where EPA does not have the ultimate statutory authority to decide such issues (e.g., not CERCLA);

(3) Inability or unwillingness of a court to rule on matters which would advance the case toward resolution; or

(4) Any other reasons slowing or halting progress leading to a decision in the action.

Level of Resources

a. Characteristic - The resolution of the dispute would require an excessive expenditure of government resources so that it would be significantly more cost- and time-efficient to use a third-party neutral to resolve all or parts of the case on terms acceptable to the Government. Situations in which ADR may be a better use of resources include those:

(1) With a large number of issues; or

(2) Which are so routine that they do not merit the usual expenditure of resources for judicial or administrative enforcement. In these cases, it would be useful to employ streamlined, binding ADR techniques such as arbitration to resolve issues without precedential value.

(4)-(9). It is most preferable in these regulatory actions to use ADR prior to referral of a civil action to the Department of Justice (DOJ). ADR may still be appropriate after filing of an action where, for example, unanticipated facts have arisen through discovery that weaken the government's case making settlement more desirable. In addition, regulatory cases that have been filed for over two years are an excellent place to look for cases suitable for ADR.

2. Level of Resources

The level of resources characteristics on the nonbinding ADR chart will apply to many Superfund actions. Characteristic (3) may apply in some regulatory cases, e.g., an air enforcement action involving an international agreement with industry specific requirements. Again, use of ADR is encouraged prior to referral to DOJ in regulatory matters.

3. Remedies Requiring Parties Not Liable For Prosecution

Only by bringing the parties described under this characteristic in the nonbinding ADR chart into the negotiations may the Agency resolve matters such as a political problem or the obtaining of funding necessary to remedy the situation. Note that EPA is specifically not endorsing the use of ADR to substitute alternative payment projects for civil penalties. While a municipality may be in violation of an EPA standard, it may not have the funds to correct the problem. Involvement of the proper state agency may provide funding for eventual compliance.

B. Examples of Binding ADR

1. Impasse

The impasse characteristics on the binding ADR chart are particularly applicable for arbitration and binding fact-finding. Under present authority nonbinding ADR may be used only for factual determinations and not ultimate liability except for cases under Section 107 of CERCLA not in excess of $500,000. Superfund cases may fall within characteristics (1), (3) or (4), and would include only those factual determinations not left to the Agency. Regulatory actions may meet any of the four characteristics. An excellent example is found in Attachment B. In these latter cases, the Agency encourages the use of binding ADR prior to referral to DOJ.

2. Level of Resources

Superfund cases may fall into either of the two parts of the level of resources characteristic on the binding ADR chart, while regulatory actions are more likely to meet the second characteristic in certain instances. Cases fitting within this characteristic might include those with a number of factual issues or a single determinative factual issue, a decision on which would obviate the need for further proceedings.

IV. PROCEDURES FOR APPROVAL OF CASES FOR ADR

This section describes procedures for the nomination of cases for ADR. These procedures are designed to eliminate confusion regarding the selection of cases for ADR by: (1) integrating the selection of cases for ADR into the existing enforcement case selection process; and (2) creating decision points and contacts in the regions, headquarters, and DOJ to determine whether to use ADR in particular actions.

A. Decisionmakers

To facilitate decisions whether to use ADR in a particular action, decision points in headquarters, the regions and DOJ must be established. At headquarters, the decisionmaker will be the appropriate Associate Enforcement Counsel (AEC). The AEC should consult on this decision with his/her corresponding headquarters compliance division director. At DOJ, the decisionmaker will be the Chief, Environmental Enforcement Section. In the regions, the decisionmakers will be both the Regional Counsel and the appropriate regional program division director. If the two authorities disagree on whether to use ADR in a particular case, then the Regional Administrator (RA) or the Deputy Regional Administrator (DRA), will decide the matter. This decisionmaking process guarantees consultation with and concurrence of all relevant interests.

B. Case Selection Procedures

Anyone in the regions, headquarters, or DOJ who is participating in the development or management of an enforcement action, or any defendant or PRP not yet named as a defendant, may suggest a case or selected issues in a case for ADR.[2] Any suggestion, however, must be communicated to and discussed with the appropriate regional office for its consent. The respective roles of the AECs and DOJ are discussed below. After a decision by the Region or litigation team to use ADR in a particular case, the nomination should be forwarded to headquarters and, if it is a referred case, to DOJ. The nominations must be in writing, and must enumerate why the case is appropriate for ADR. (See Section III of this document which describes the characteristics for selection of cases for ADR.) Attachments A and B are sample communications. Attachment A pertains to nonbinding ADR, and Attachment B pertains to binding ADR.

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[2] At the Region's option, nomination papers may be deemed attorney work product so that they are discovery free.

Upon a determination by the Government to use ADR, Government enforcement personnel assigned to the case (case team) must approach the PRP(s) or defendant(s) with the suggestion. The case team should indicate to the PRP(s) or defendant(s) the factors which have led to the Agency's recommendation to use ADR, and the potential benefits to all parties from its use. The PRP(s) or defendant(s) should understand, nevertheless, that the Government is prepared to proceed with vigorous litigation in the case if the use of a third-party neutral fails to resolve the matter. Further, for cases which are referrable, the defendant(s) should be advised that EPA will not hesitate to refer the matter to DOJ for prosecution.

Nonbinding ADR

For mediation, mini-trials, nonbinding arbitration, and other ADR mechanisms involving use of a third-party neutral as a nonbinding decisionmaker, regions should notify the appropriate AEC and, if the case is referred, DOJ of: (1) its intent to use ADR in a particular case, and (2) the opportunity to consult with the Region on its decision. The AEC will consult with the appropriate headquarters program division director. The Region may presume that the AEC and DOJ agree with the selection of the case for ADR unless the AEC or DOJ object within ten (10) calendar days of receipt of the nomination of the case.

Binding ADR

For binding arbitration and fact-finding, and other ADR mechanisms involving the use of third-party neutrals as binding decisionmakers, the appropriate AEC must concur in the nomination of the case by the Region. In addition, DOJ must also concur in the use of binding ADR in referred cases. Finally, in non-CERCLA cases which may involve compromise of claims in excess of $20,000 or where the neutral's decision will be embodied in a court order, DOJ must also concur. Without the concurrence of headquarters and DOJ under these circumstances, the Region may not proceed with ADR. OECM and DOJ should attempt to concur in the nomination within ten (10) days of receipt of the nomination.

Under the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, §122(h)(2)(1986), EPA may enter into binding arbitration for cost recovery claims under Section 107 of CERCLA, provided the claims are not in excess of $500,000, exclusive of interest. Until regulations are promulgated under this section, EPA is precluded from entering into binding arbitration in cost recovery actions. Accordingly, Attachment C is not appropriate for use in cases brought under this section.

V. SELECTION OF A THIRD-PARTY NEUTRAL

A. Procedures for Selection

Both the Government and all defendants must agree on the need for a neutral in order to proceed with ADR. In some situations (e.g., in a Superfund case), however, the parties may proceed with ADR with consensus of only some of the parties depending on the issue and the parties. Once agreed, the method for selecting the neutral and the actual selection in both Superfund and other cases will be determined by all parties involved with the exception of cases governed by §107 of CERCLA. To help narrow the search for a third-party neutral, it is useful, although not required, for the parties to agree preliminarily on one or more ADR mechanisms. OECM is available to help at this point in the process, including the procurement of in-house or outside persons to aid the parties in selecting an appropriate ADR mechanism.

In Section VII below, we have indicated some of the situations where each ADR mechanism may be most appropriate. Of course, the parties are free to employ whichever technique they deem appropriate for the case. Because the ADR mechanisms are flexible, they are adaptable to meet the needs and desires of the parties.

The parties can select a third-party neutral in many ways. Each party may offer names of proposed neutrals until all parties agree on one person or organization. Alternatively, each party may propose a list of candidates, and allow the other parties to strike unacceptable names from the list until agreement is reached. For additional methods, see Attachments C, D, and E.

Regardless of how the parties decide to proceed, the Government may obtain names of qualified neutrals from the Chief, Legal Enforcement Policy Branch (LEPB) (FTS 475-8777, LE-130A, E-Mail box EPA 2261), by written or telephone request. With the help of the Administrative Conference of the U.S. and the Federal Mediation and Conciliation Service, OECM is working to establish a national list of candidates from which the case team may select neutrals. In selecting neutrals, however, the case team is not limited to such a list.

It is important to apply the qualifications enumerated below in section V.D. in evaluating the appropriateness of a proposed third-party neutral for each case. Only the case team can decide whether a particular neutral is acceptable in its case. The qualifications described below provide guidance in this area.

At any point in the process of selecting an ADR mechanism or third-party neutral, the case team may consult with the Chief, LEPB, for guidance.

B. Qualifications for Third-Party Neutrals

The following qualifications are to be applied in the selection of all third-party neutrals who may be considered for service in ADR procedures to which EPA is a party. While a third-party neutral should meet as many of the qualifications as possible, it may be difficult to identify candidates who possess all the qualifications for selection of a third-party neutral. Failure to meet one or more of these qualifications should not necessarily preclude a neutral who all the parties agree would be satisfactory to serve in a particular case. The qualifications are, therefore, intended only as guidance rather than as prerequisites to the use of ADR. Further, one should apply a greater degree of flexibility regarding the qualifications of neutrals involved in nonbinding activities such as mediation, and a stricter adherence to the qualifications for neutrals making binding decisions such as arbitrators.

1. Qualifications for Individuals

a. Demonstrated Experience. The candidate should have experience as a third-party neutral in arbitration, mediation or other relevant forms of ADR. However, other actual and active participation in negotiations, judicial or administrative hearings or other forms of dispute resolution, service as an administrative law judge, judicial officer or judge, or formal training as a neutral may be considered. The candidate should have experience in negotiating, resolving or otherwise managing cases of similar complexity to the dispute in question, e.g., cases involving multiple issues, multiple parties, and mixed technical and legal issues where applicable.

b. Independence. The candidate must disclose any interest or relationship which may give rise to bias or the appearance of bias toward or against any party. These interests or relationships include:

(a) past, present or prospective positions with or financial interests in any of the parties;

(b) any existing or past financial, business, professional, family or social relationships with any of the parties to the dispute or their attorneys;

(c) previous or current involvement in the specific dispute;

(d) past or prospective employment, including employment as a neutral in previous disputes, by any of the parties;

(e) past or present receipt of a significant portion of the neutral's general operating funds or grants from one or more of the parties to the dispute.

The existence of such an interest or relationship does not necessarily preclude the candidate from serving as a neutral, particularly if the candidate has demonstrated sufficient independence by reputation and performance. The neutrals with the most experience are most likely to have past or current relationships with some parties to the dispute, including the Government. Nevertheless, the candidate must disclose all interests, and the parties should then determine whether the interests create actual or apparent bias.

c. Subject Matter Expertise. The candidate should have sufficient general knowledge of the subject matter of the dispute to understand and follow the issues, assist the parties in recognizing and establishing priorities and the order of consideration of those issues, ensure that all possible avenues and alternatives to settlement are explored, and otherwise serve in the most effective manner as a third-party neutral. Depending on the case, it may also be helpful if the candidate has specific expertise in the issues under consideration.

d. Single Role. The candidate should not be serving in any other capacity in the enforcement process for that particular case that would create actual or apparent bias. The case team should consider any prior involvement in the dispute which may prevent the candidate from acting with objectivity. For example, involvement in developing a settlement proposal, particularly when the proposal is developed on behalf of certain parties, may preclude the prospective neutral from being objective during binding arbitration or other ADR activities between EPA and the parties concerning that particular proposal.

Of course, rejection of a candidate for a particular ADR activity, such as arbitration, does not necessarily preclude any role for the candidate in that case. The candidate may continue to serve in other capacities by, for example, relaying information among parties and presenting offers on behalf of particular parties.

2. Qualifications for Corporations And Other Organizations.[3] Corporations or other entities or organizations which propose to act as third-party neutrals, through their officers, employees or other agents, in disputes involving EPA, must:

(a) like unaffiliated individuals, make the disclosures listed above; and

(b) submit to the parties a list of all persons who, on behalf of the corporation, entity or organization, will or may be significantly involved in the ADR procedure. These representatives should also make the disclosures listed above.

In selecting a third-party neutral to resolve or aid in the resolution of a dispute to which EPA is a party, Agency personnel should remain at all times aware that the Agency must not only uphold its obligation to protect public health, welfare and the environment, but also develop and maintain public confidence that the Agency is performing its mission. Care should be taken in the application of these qualifications to avoid the selection of third-party neutrals whose involvement in the resolution of the case might undermine the integrity of that resolution and the enforcement efforts of the Agency.

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[3] For further guidance regarding Clean Sites Inc., see guidance from the Administrator on the "Role of Clean Sites Inc. at Superfund Sites."

VII. OTHER ISSUES:

A. Memorialization of Agreements

Just as it would in cases where ADR has not been used, the case team should memorialize agreements reached through ADR in orders and settlement documents and obtain DOJ and headquarters approval (as appropriate) of the terms of any agreement reached through ADR.

B. Fees For Third-Party Neutrals

The Government's share of ADR costs will be paid by Headquarters. Contact LEPB to initiate payment mechanisms. Because such mechanisms require lead time, contact with LEPB should be made as early as possible after approval of a case for ADR.

It is EPA policy that PRPs and defendants bear a share of these costs equal to EPA except in unusual circumstances. This policy ensures that these parties "buy in" to the process. It is important that the exact financial terms with these parties be settled and set forth in writing before the initiation of ADR in the case.

C. Confidentiality

Unless otherwise discoverable, records and communications arising from ADR shall be confidential and cannot be used in litigation or disclosed to the opposing party without permission. This policy does not include issues where the Agency is required to make decisions on the basis of an administrative record such as the selection of a remedy in CERCLA cases. Public policy interests in fostering settlement compel the confidentiality of ADR negotiations and documents. These interests are reflected in a number of measures which seek to guarantee confidentiality and are recognized by a growing body of legal authority.

Most indicative of the support for non-litigious settlement of disputes is Rule 408 of the Federal Rules of Evidence which renders offers of compromise or settlement or statements made during discussions inadmissable in subsequent litigation between the parties to prove liability. Noting the underlying policy behind the rule, courts have construed the rule to preclude admission of evidence regarding the defendant's settlement of similar cases.[4]

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[4] See Scaramuzzo v. Glenmore Distilleries Co., 501 F.Supp. 727 (N.D. Ill. 1980), and to bar discovery, see Branch v. Phillips Petroleum Co., 638 F.2d 873 (5th Cir. 1981). Courts have also construed labor laws to favor mediation or arbitration and have therefore prevented third-party neutrals from being compelled to testify. See, e.g., N.L.R.B. v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980) (upholding N.L.R.B.'s revocation of subpoena issued to mediator to avoid breach of impartiality).

Ememption protection under the Freedom of Information Act (FOIA), 15 U.S.C. §552, could also accommodate the interest in confidentiality. While some courts have failed to recognize the "settlement negotiations privilege,"[5] other courts have recognized the privilege.[6]

In addition to these legal authorities and policy arguments, confidentiality can be ensured by professional ethical codes. Recognizing that promoting candor on the parties' part and impartiality on the neutral's part is critical to the success of ADR, confidentiality provisions are incorporated into codes of conduct as well as written ADR agreements (See Attachment D).

Furthermore, confidentiality can be effected by court order, if ADR is court supervised. Finally, as many states have done statutorily, EPA is considering the promulgation of regulations which further ensure the confidentiality of ADR proceedings.

D. Relationship of ADR to Timely and Appropriate and Significant Noncompliance Requirements

The decision to use ADR would have no particular impact under the "timely and appropriate" (T&A) criteria on a case where there is already an administrative order or a civil referral since the "timely and appropriate" criteria would have been met by the initiation of the formal enforcement action. The decision to use ADR to resolve a violation prior to the initiation of a formal enforcement action, however, would be affected by applicable "timely and appropriate" criteria (e.g., if the violation fell under a program's Significant Noncompliance (SNC) definition, the specific timeframes in which compliance must be achieved or a formal enforcement action taken would apply). The use of ADR would not exempt applicable "T&A" requirements and the ADR process would normally have to proceed to resolve the case or "escalate" the enforcement response. However, since, "T&A" is not an immutable deadline, that ADR is being used for a particular violation would be of central significance to any program management review of that case (e.g., the Deputy Administrator's discussion of "timely and appropriate" enforcement during a regional review would identify the cases in which ADR is being used.)

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[5] See, e.g., Center for Auto Safety v. Department of Justice, 576 F.Supp. 739, 749 (D.D.C. 1983).

[6] See Bottaro v. Hatton Associates, 96 F.R.D. 158-60 (E.D.N.Y 1982) (noting "strong public policy of favoring settlements" and public interest in "insulating the bargaining table from unnecessary intrusions"). In interpreting Exemption 5 of the FOIA, the Supreme Court asserted that the "contention that [a requester could] obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. ...We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented." United States v. Weber Aircraft, 104 S.Ct. 1488, 1494 (1984).

VIII. PROCEDURES FOR MANAGEMENT OF ADR CASES

This section elaborates on the various ADR techniques: How they work, some problems that may be encountered in their use, and their relationship to negotiation and litigation. For each ADR technique, we have provided, as an attachment to this guidance, an example of procedures. These attachments are for illustrative purposes only, and do not represent required procedures. The specific provisions of the attachments should be adapted to the circumstances of the case or eliminated if not applicable.

A. Arbitration

1. Scope and Nature

As stated in Section II, above, arbitration involves the selection by the parties of a neutral decisionmaker to hear selected issues and render an opinion. Depending on the parties' agreement, the arbitrator's decision may or may not be binding. Without additional statutory authority, the Government may enter into binding arbitration only to resolve factual issues. Included as Attachment C are draft generic arbitration procedures for formal arbitration. To conduct less formal proceedings, the parties may modify the procedures.

2. Use

Arbitration is most appropriate in resolving routine cases that do not merit the resources required to generate and process a civil judicial referral, and in resolving technical disputes that are usually submitted to the courts or administrative law judges (ALJs), which disputes require subject-matter expertise which federal district court judges and ALJs may lack.[7]

The Comptroller General has on several occasions interpreted 31 U.S.C. §1346 to prohibit agency use of arbitration in the absence of specific authorization. This section bars the use of public money for "the pay or expenses of a commission, council, board or similar group, or a member of that group" unless that commission or board is "authorized by law." In more recent opinions, the Comptroller General has accepted arbitration only for purposes of fact-finding or appraising value (see 32. Comp. Gen. 333 (1953)). The Comptroller General approves the use of arbitration to determine facts in which the arbitrator does not impose any obligation on the Government or leaves questions of legal liability for a judge's or ALJ's determination (see GAO OGC Opinion B-191484, (unpublished) (May 11, 1978)).

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[7] Arbitration is specifically authorized under Section 107 of CERCLA for cost recovery claims not in excess of $500,000, exclusive of interest.

Accordingly, with the exception of cases under section 122 of SARA, EPA policy is to use arbitration in enforcement actions to decide only factual issues rather than liability or legal issues. These factual issues include determinations involving technical or scientific disputes, reasonable value, and the occurrence of events.

B. Mediation

1. Scope and Nature

Mediation, an informal process, is entered into voluntarily by the parties to a dispute and in no way binds them beyond their own agreement. More than the other ADR processes, mediation is best viewed as an extension of the direct negotiation process begun by the parties. As in direct negotiation, the parties continue to control the substance of discussions and any agreement reached. In mediation, however, the mediator directs and structures the course of discussions.

The mediation format varies with the individual style of the mediator and the needs of the parties. Initially, the mediator is likely to call a joint meeting with the parties to work out ground rules such as how and when meetings will be scheduled. Included as Attachment D are generic mediation protocols for use and adaptation in all EPA mediations. Most of the items covered in the attachment would be useful as ground rules for most EPA enforcement negotiations. Ordinarily, mediators will hold a series of meetings with the parties in joint session, as well as with each party. In joint meetings, the mediator facilitates discussion. In separate caucuses, the mediator may ask questions or pose hypothetical terms to a party in order to clarify its position and identify possible areas for exchange and agreement with the opposing party. Some mediators will be more aggressive than others in this role; they may even suggest possible settlement alternatives to resolve deadlocks between the parties. In general, however, the mediator serves as a facilitator of discussions and abstains from taking positions on substantive points.

There are no external time limits on mediation other than those imposed by the parties or by external pressures from the courts, the community or public interest groups. In all cases, the Government should insist on a time limit for the mediation to ensure that the defendants do not use mediation as a stalling device. The Government should also insist on establishing points in the process to evaluate progress of the mediation. As the parties approach settlement terms through mediation, final authority for decisionmaking remains the same as during direct negotiations, i.e., requirements for approval or concurrence from senior managers are applicable.

2. Use of Mediation

Mediation is appropriate for disputes in which the parties have reached or anticipate a negotiation impasse based on, among other things, personality conflicts, poor communication, multiple parties, or inflexible negotiating postures. Additionally, mediation is useful in those cases where all necessary parties are not before the court (e.g., a state which can help with the funding for a municipality's violation). Mediation is the most flexible ADR mechanism, and should be the most widely used in Agency disputes.

3. Withdrawal from Mediation

As a voluntary and unstructured process, mediation proceeds entirely at the will of the parties and, therefore, may be concluded by the parties prior to settlement. A determination to withdraw from mediation should be considered only when compelling factors militate against proceeding. If the mediation has extended beyond a reasonable time period (or the period agreed upon by the parties) without significant progress toward agreement, it may be best to withdraw and proceed with direct negotiations or litigation. Withdrawing from mediation might also be considered in the unlikely event that prospects for settlement appear more remote than at the outset of the mediation. Finally, inappropriate conduct by the mediator would warrant concluding the mediation effort or changing mediators.

4. Relation to Litigation

To avoid being unprepared should the court or the ALJ schedule a trial or hearing, EPA should normally continue preparation for litigation by maintaining contact with witnesses, updating files, and preparing legal memoranda. Just as during negotiations, preparation should not include actions such as serving interrogatories, taking depositions, or filing motions because those actions may be interpreted by defendants as failure to bargain in good faith. In addition, where a case is divisible into discreet parts, it may be prudent to proceed with other parts of a case such as criminal charges or constitutional or statutory challenges. Another option is to suspend litigation for a specified time during mediation, and use the threat of litigation to exert pressure. In filed civil judicial cases, the court usually imposes deadlines. As with all ADR mechanisms, it will probably be necessary to apprise the court of the parties' activities and to build ADR into the court's timetable. For agreements relating ADR activities to ongoing litigation, see paragraph 18 of Attachment E.

C. Mini-Trial

1. Scope and Nature

Like other ADR techniques, the mini-trial is also voluntary and nonbinding on the parties. In the mini-trial, authority for resolution of one or more issues rests with senior managers who, representing each party in the dispute, act as decisionmakers. In some cases a neutral referee is appointed to supervise the proceedings and assist the decisionmakers in resolving an issue by providing the parties with a more realistic view of their case. In addition, the neutral's presence can enhance public acceptability of a resolution by effectively balancing the interests of the Government and the defendant.

The scope and format of the mini-trial are determined solely by the parties to the dispute and are outlined in an initiating agreement. Because the agreement will govern the proceedings, the parties should carefully consider and define issues in advance of the mini-trial. Points that could be covered include the option of and role for a neutral, issues to be considered, and procedural matters such as order and schedule of proceedings and time limits. Attachment E is a sample mini-trial agreement.

The mini-trial proceeds before a panel of decisionmakers representing the parties and, in some cases, a neutral referee. Preferably, the decisionmakers will not have participated directly in the case prior to the mini-trial. The defendant's representative should be a principal or executive of the entity with decisionmaking authority. EPA's representative should be a senior Agency official comparable in authority to the defendant's representative. In some cases, each side may want to use a panel consisting of several decisionmakers as its representatives. The neutral referee is selected by both parties and should have expertise in the issues under consideration.

At the mini-trial, counsel for each side presents his or her strongest and most persuasive case to the decisionmakers in an informal, trial-like proceeding. In light of this structure, strict rules of evidence do not apply, and the format for the presentation is unrestricted. Each decisionmaker is then afforded the unique opportunity to proceed, as agreed, with open and direct questioning of the other side. This information exchange allows the decisionmakers to adjust their perspectives and positions in light of a preview of the case. Following this phase of the mini-trial, the decisionmakers meet, with or without counsel or the neutral referee, to resolve the issue(s) or case presented, through negotiation.

2. Role of the Neutral

The neutral referee may serve in more than one capacity in this process, and should be selected with a clearly defined concept of his or her role. The most common role is to act as an advisor to the decisionmakers during the information exchange. The neutral may offer opinions on points made or on adjudication of the case in litigation, and offer assistance to the decisionmakers in seeing the relative merits of their positions. The neutral's second role can be to mediate the negotiation between the decisionmakers should they reach an impasse or seek assistance in forming an agreement. Unless otherwise agreed by the parties, no evidence used in the mini-trial is admissible in litigation.

3. Use

In general, mini-trials are appropriate in cases involving only a small number of parties, and are most useful in four kinds of disputes:

1. Where the parties have reached or anticipate reaching a negotiation impasse due to one party's overestimation, in the view of the other party, of the strength of its position;

2. Where the case involves mixed questions of law and fact;

3. Where the issues are technical, and the decisionmakers and neutral referee have subject-matter expertise; or

4. Where the imprimatur of a neutral's expertise would aid in the resolution of the case.

D. Fact-finding

1. Scope and Nature

Binding or nonbinding fact-finding may be adopted voluntarily by parties to a dispute, or imposed by a court. It is most appropriate for issues involving technical or factual disputes. The primary purpose of this process is to reduce or eliminate conflict over facts at issue in a case. The fact-finder's role is to act as an independent investigator, within the scope of the authority delegated by the parties. The findings may be used in reaching settlement, as "facts" by a judge or ALJ in litigation, or as binding determinations. Like other ADR processes involving a neutral, a resolution based on a fact-finder's report will have greater credibility with the public.

The neutral's role in fact-finding is clearly defined by an initial agreement of the parties on the issue(s) to be referred to the fact-finder and the use to be made of the findings or recommendations, e.g., whether they will be binding or advisory. Once this agreement is framed, the role of the parties in the process is limited and the fact-finder proceeds independently. The fact-finder may hold joint or separate meetings or both with the parties in which the parties offer documents, statements, or testimony in support of their positions. The fact-finder is also free to pursue other sources of information relevant to the issue(s). The initial agreement of the parties should include a deadline for receipt of the fact-finder's report. Attachment F is a sample fact-finding agreement.

The fact-finder issues a formal report of findings, and recommendations if appropriate, to the parties, ALJ or the court. If the report is advisory, the findings and recommendations are used to influence the parties' positions and give impetus to further settlement negotiations. If the report is binding, the parties adopt the findings and recommendations as provisions of the settlement agreement. In case of litigation, the findings will be adopted by the judge or ALJ as "facts" in the case.

2. Relation to Litigation

Decisions regarding pursuit of litigation when fact-finding is instituted are contingent upon the circumstances of the case and the issues to be referred to the fact-finder. If fact-finding is undertaken in connection with an ongoing settlement negotiation, in most cases it is recommended that the parties suspend negotiations on the issues requiring fact-finding until the fact-finder's report is received. If fact-finding is part of the litigation process, a decision must be made whether to proceed with litigation of the rest of the case or to suspend litigation while awaiting the fact-finder's report.

ATTACHMENT A

MEMORANDUM

SUBJECT: Nomination of U.S. v. XYZ Co. for Non-binding Alternative for Dispute Resolution

FROM: Deputy Regional Administrator

TO: Associate Enforcement Counsel
for Hazardous Waste Enforcement

This memorandum is to nominate U.S. v. XYZ Co. for alternative dispute resolution (ADR). The case is a CERCLA enforcement action involving multiple PRPs as well as a number of complex technical and legal issues. The RI/FS and the record of decision have both been completed. We anticipate that the PRPs are interested in settling this matter and, we believe, a trained mediator will greatly aid negotiations. The members of the litigation team concur in this judgment.

If we do not hear to the contrary from you or the Department of Justice within ten (10) days, we will presume that you agree with the nomination of this case for ADR. We look forward to working with your offices in this matter.

cc: Chief, Environmental Enforcement Section
Department of Justice

Attachment B

MEMORANDUM

SUBJECT: Nomination of United States v. ABC Co. for Binding Alternative Dispute Resolution

FROM: Deputy Regional Administrator

TO: Associate Enforcement Counsel for Water Enforcement

This memorandum requests concurrence in the use of a binding fact-finding procedure in United States v. ABC Co. The case involves the following facts:

ABC Co. owns and operates a specialty chemical production and formulation facility. Wastewater streams come from a variety of production areas which change with product demand. Because of these diverse processes, the company's permit to discharge wastewater must be based on the best professional judgment of the permit writer as to the level of pollution control achievable.

The company was issued an NPDES permit in 1986. The permit authorizes four (4) outfalls and contains limits for both conventional and toxic organic pollutants. The effluent limitations of the permit incorporate the Best Available Technology requirements of the Clean Water Act (CWA).

EPA filed a civil lawsuit against the company for violating effluent limits of the 1986 permit. As part of the settlement of the action, the company was required to submit a compliance plan which would provide for modification of its existing equipment, including institution of efficient operation and maintenance procedures to obtain compliance with the new permit. The settlement agreement provides for Agency concurrence in the company's compliance plan.

The company submitted a compliance plan, designed by in-house engineers, which proposed to slightly upgrade their existing activated sludge treatment system. The company has claimed that this upgraded system provides for treatment adequate to meet the permit limits. EPA has refused to concur in the plan because EPA experts believe that additional treatment modifications to enhance pollutant removals are required to meet permit limits on a continuous basis. This enhancement, EPA believes, is possible with moderate additional capital expenditures.

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A fact-finding panel, consisting of experts in utility, sanitation and chemical engineering, is needed to assess the adequacy of the treatment system improvements in the compliance plan in satisfying permit requirements. Resolution of this issue by binding, neutral fact-finding will obviate the expenditure of resources needed to litigate the issue.

We request your concurrence in the nomination of this case for fact-finding within ten (10) days. We look forward to hearing from you.

cc: Chief, Environmental Enforcement Section
Department of Justice

Attachment C

Arbitration Procedures*

SUBPART A - GENERAL

1. Purpose

This document establishes and governs procedures for the arbitration of EPA disputes arising under [insert applicable statutory citations].

2. Scope and Applicability

The procedures enunciated in this document may be used to arbitrate claims or disputes of the EPA regarding [insert applicable statutory citations and limitations on scope, if any.]

SUBPART B - JURISDICTION OF ARBITRATOR, REFERRAL OF CLAIMS, AND ARBITRATOR SELECTION

1. Jurisdiction of Arbitrator

(a) In accordance with the procedures set forth in this document, the Arbitrator is authorized to arbitrate [insert applicable categories of claims or disputes.]

(b) The Arbitrator is authorized to resolve disputes and award claims within the scope of the issues presented in the joint request for arbitration.

2. Referral of Disputes

(a) EPA [insert reference to mechanism by which EPA has entered into dispute, *e.g.*, after EPA has issued demand letters or an administrative order], and one or more parties to the case may submit a joint request for arbitration of [EPA's claim, or one or more issues in dispute among the parties] ______________ [a group authorized to arbitrate such matters, e.g., the National Arbitration Association (NAA)] if [restate any general limitations on scope]. The joint request shall include: A statement of the matter in dispute; a statement of the issues to be submitted for resolution; a statement that the signatories consent to arbitration of the dispute in accordance with the procedures established by this document; and the appropriate filing fee.

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* Regulations applicable to section 112 of SARA are currently being prepared.

(b) Within thirty days after submission of the joint request for arbitration, each signatory to the joint request shall individually submit to the National Arbitration Association two copies of a written statement which shall include:

(1) An assertion of the parties' positions in the matter in dispute;

(2) The amount of money in dispute, if appropriate;

(3) The remedy sought;

(4) Any supporting documentation which the party deems necessary to support its position;

[(5) A statement of the legal standard applicable to the claim and any other applicable principles of law relating to the claim;]

(6) The identity of any known parties who are not signatories to the joint request for arbitration; and

(7) A recommendation for the locale for the arbitral hearing.

A copy of the statement shall be sent to all parties.

3. Selection of Arbitrator

(a) The NAA shall establish and maintain a National Panel of Environmental Arbitrators.

(b) After the filing of the joint request for arbitration, the NAA shall submit simultaneously to all parties to the dispute an identical list of ten [five] names of persons chosen from the National Panel of Environmental Arbitrators. Each party to the dispute shall have seven days from the date of receipt to strike any names objected to, number the remaining names to indicate order of preference, and return the list to the NAA. If a party does not return the list within the time specified, all persons named shall be deemed acceptable. From among the persons who have been approved on all lists, and if possible, in accordance with the designated order of mutual preference, the NAA shall invite an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to serve, or if for any other reason the appointment cannot be made from the submitted lists, the NAA shall make the appointment from among other members of the Panel without the submission of any additional lists. Once the NAA makes the appointment, it shall immediately notify the parties of the identity of the Arbitrator and the date of the appointment.

(c) The dispute shall be heard and determined by one Arbitrator, unless the NAA decides that three Arbitrators should be approved based on the complexity of the issues or the number of parties.

(d) The NAA shall notify the parties of the appointment of the Arbitrator and send a copy of these rules to each party. A signed acceptance of the case by the Arbitrator shall be filed with the NAA prior to the opening of the hearing. After the Arbitrator is appointed, all communications from the parties shall be directed to the Arbitrator.

(e) If any Arbitrator should resign, die, withdraw, or be disqualified, unable or refuse to perform the duties of the office, the NAA may declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of this Section, and unless the parties agree otherwise, the matter shall be reheard.

4. Disclosure

(a) A person appointed as an Arbitrator under the above section shall, within five days of receipt of his or her notice of appointment disclose to the NAA any circumstances likely to affect impartiality, including [those factors listed in section IV(D) of the accompanying guidance]

(b) Upon receipt of such information from an appointed Arbitrator or other source, the NAA shall on the same day communicate such information to the parties and, if it deems it appropriate, to the Arbitrator and others.

(c) The parties may request within seven days of receipt of such information from the NAA that an Arbitrator be disqualified.

(d) The NAA shall make a determination on any request for disqualification of an Arbitrator within seven days after the NAA receives any such request. This determination shall be within the sole discretion of the NAA, and its decision shall be final.

5. Intervention and Withdrawal

(a) Subject to the approval of the parties and the Arbitrator, any person [insert applicable limitations, if any, e.g. any person with a substantial interest in the subject of the referred dispute] may move to intervene in the arbitral proceeding. Intervening parties shall be bound by rules that the Arbitrator may establish.

(b) Any party may for good cause shown move to withdraw from the arbitral proceeding. The Arbitrator may approve such withdrawal, with or without prejudice to the moving party, and may assess administrative fees or expenses against the withdrawing party as the Arbitrator deems appropriate.

SUBPART C - HEARINGS BEFORE THE ARBITRATOR

1. Filing of Pleadings

(a) Any party may file an answering statement with the NAA no later than seven days from the date of receipt of an opposing party's written statement. A copy of any answering statement shall be served upon all parties.

(b) Any party may file an amended written statement with the NAA prior to the appointment of the Arbitrator. A copy of the amended written statement shall be served upon all parties. After the Arbitrator is appointed, however, no amended written statement may be submitted except with the Arbitrator's consent.

[(c) Any party may file an answering statement to the amended written statement with the NAA no later than seven days from the date of receipt of an opposing party's amended written statement. A copy of any answering statement shall be served upon all parties.]

2. Pre-hearing Conference

At the request of one or more of the parties or at the discretion of the Arbitrator, a pre-hearing conference with the Arbitrator and the parties and their counsel will be scheduled in appropriate cases to arrange for an exchange of information, including witness statements, documents, and the stipulation of uncontested facts to expedite the arbitration proceedings. The Arbitrator may encourage further settlement discussions during the pre-hearing conference to expedite the arbitration proceedings. Any pre-hearing conference must be held within sixty days of the appointment of the Arbitrator.

3. Arbitral Hearing

(a) The Arbitrator shall select the locale for the arbitral hearing, giving due consideration to any recommendations by the parties.

(b) The Arbitrator shall fix the time and place for the hearing.

(c) The hearing shall commence within thirty days of the pre-hearing conference, if such conference is held, or within sixty [thirty] days of the appointment of the Arbitrator, if no pre-hearing conference is held. The Arbitrator shall notify each party by mail of the hearing at least thirty days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

(d) Any party may be represented by counsel. A party who intends to be represented shall notify the other parties and the Arbitrator of the name and address of counsel at least three days prior to the date set for the hearing at which counsel is to appear. When an arbitration is initiated by counsel, or where an attorney replies for the other parties, such notice is deemed to have been given.

(e) The Arbitrator shall make the necessary arrangements for making a record of the arbitral hearing.

(f) The Arbitrator shall make the necessary arrangements for the services of an interpreter upon the request of one or more of the parties, and the requesting parties shall assume the cost of such service.

(g) The Arbitrator may halt the procedings upon the request of any party or upon the Arbitrator's own initiative.

(h) The Arbitrator shall administer oaths to all witnesses before they testify at the arbitral hearing.

(i) (1) A hearing shall be opened by the recording of the place, time, and date of the hearing, the presence of the Arbitrator and parties, and counsel if any, and by the receipt by the Arbitrator of the written statements, amended written statements, if any, and answering statements, if any. The Arbitrator may, at the beginning of the hearing, ask for oral statements clarifying the issues involved.

(2) The EPA shall then present its case, information and witnesses, if any, who shall answer questions posed by both parties. The Arbitrator has discretion to vary this procedure but shall afford full and equal opportunity to all parties for the presentation of any material or relevant information.

(3) Exhibits, when offered by any party, may be received by the Arbitrator. The names and addresses of all

witnesses, and exhibits in the order received, shall be part of the record.

(j) The arbitration may proceed in the absence of any party which, after notification, fails to be present or fails to obtain a stay of proceedings. If a party, after notification, fails to be present, fails to obtain a stay, or fails to present information, the party will be in default and will have waived the right to be present at the arbitration. A decision shall not be made solely on the default of a party. The Arbitrator shall require the parties who are present to submit such information as the Arbitrator may require for the making of a decision.

(k) Information and Evidence

(1) The parties may offer information as they desire, subject to reasonable limitations as the Arbitrator deems appropriate, and shall produce additional information as the Arbitrator may deem necessary to an understanding and determination of the dispute. The Arbitrator shall be the judge of the relevancy and materiality of the information offered, and conformity to legal rules of evidence shall not be necessary.

(2) All information shall be introduced in the presence of the Arbitrator and all parties, except where any of the parties has waived the right to be present pursuant to paragraph (j) of this section. All information

pertinent to the issues presented to the Arbitrator for decision, whether in oral or written form, shall be made a part of the record.

(l) The Arbitrator may receive and consider the evidence of witnesses by affidavit, interrogatory or deposition, but shall give the information only such weight as the Arbitrator deems appropriate after consideration of any objections made to its admission.

(m) After the presentation of all information, the Arbitrator shall specifically inquire of all parties whether they have any further information to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare the hearing closed and minutes thereof shall be recorded.

(n) The parties may provide, by written agreement, for the waiver of the oral hearing.

(o) All documents not submitted to the Arbitrator at the hearing, but arranged for at the hearing or by subsequent agreement of the parties, shall be filed with the Arbitrator. All parties shall be given an opportunity to examine documents.

4. Arbitral Decision

(a) The Arbitrator shall render a decision within thirty [five] days after the hearing is declared closed except if:

(1) All parties agree in writing to an extension; or

(2) The Arbitrator determines that an extension of the time limit is necessary.

(b) The decision of the Arbitrator shall be signed and in writing. It shall contain a brief statement of the basis and rationale for the Arbitrator's determination. At the close of the hearing, the Arbitrator may issue an oral opinion which shall be incorporated into a subsequent written opinion.

(c) The Arbitrator may grant any remedy or relief within the scope of the issues presented in the joint request for arbitration.

(d) The Arbitrator shall assess arbitration fees and expenses in favor of any party, and, in the event any administrative fees or expenses are due the NAA, in favor of the NAA.

(e) If the dispute has been heard by three Arbitrators, all decisions and awards must be made by at least a majority, unless the parties agree in writing otherwise.

(f) If the parties settle their dispute during the course of the arbitration, the Arbitrator, upon the parties' request, may set forth the terms of the agreed settlement.

(g) The Arbitrator shall mail to or serve the decision on the parties.

(h) The Arbitrator shall, upon written request of any party, furnish certified facsimiles of any papers in the Arbitrator's possession that may by required in judicial proceedings relating to the arbitration.

SUBPART D - APPEALS, FEES AND OTHER PROVISIONS

1. Appeals Procedures

(a) Any party may appeal the award or decision within thirty days of notification of the decision. Any such appeal shall be made to the [insert "Federal district court for the district in which the arbitral hearing took place" or "Chief Judicial Officer, U.S. Environmental Protection Agency"].

(b) The award or decision of the Arbitrator shall be binding and conclusive, and shall not be overturned unless achieved through fraud, misrepresentation, abuse of discretion, other misconduct by any of the parties, or mutual mistake of fact. [Insert "No court shall" or "The Chief Judicial Officer shall not"] have jurisdiction to review the award or decision unless there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, abuse of discretion, other misconduct, or mutual mistake of fact.

(c) Judgment upon the arbitration award may be entered in any Federal district court having jurisdiction. The award may be enforced in any Federal district court having jurisdiction.

(d) Except as provided in paragraph (c), no award or decision shall be admissible as evidence of any issue of fact or law in any proceeding brought under any other provision of [insert applicable statutory acronyms] or any other provision of law, nor shall any prearbitral settlement be admissible as evidence in any such proceeding. Arbitration decisions shall have no precedential value for future arbitration, administratiave or judicial proceedings.

2. Administrative Fees, Expenses, and Arbitrator's Fee

(a) The NAA shall prescribe an Administrative Fee Schedule and a Refund Schedule. The schedules in effect at the time of filing or the time of refund shall be applicable. The filing fee shall be advanced by the parties to the NAA as part of the joint request for arbitration, subject to apportionment of the total administrative fees by the Arbitrator in the award. If a matter is withdrawn or settled, a refund shall be made in accordance with the Refund Schedule.

(b) Expenses of witnesses shall be borne by the party presenting such witnesses. The expense of the stenographic record and all transcripts thereof shall be prorated equally among all parties ordering copies, unless otherwise agreed by the parties, or unless the Arbitrator assesses such expenses or any part thereof against any specified party in the award.

(c) The per diem fee for the Arbitrator shall be agreed upon by the parties and the NAA prior to the commencement of any activities by the Arbitrator. Arrangements for compensation of the Arbitrator shall be made by the NAA.

(d) The NAA may require an advance deposit from the parties to defray the Arbitrator's Fee and the Administrative Fee, but shall render an accounting to the parties and return any balance of such deposit in accordance with the Arbitrator's award.

3. Miscellaneous Provisions

(a) Any party who proceeds with the arbitration after knowledge that any provision or requirement of this Part has not been complied with, and who fails to object either orally or in writing, shall be deemed to have waived the right to object. An objection, whether oral or written, must be made at the earliest possible opportunity.

(b) Before the selection of the Arbitrator, all oral or written communications from the parties for the Arbitrator's consideration shall be directed to the NAA for eventual transmittal to the Arbitrator.

(c) Neither a party nor any other interested person shall engage in *ex parte* communication with the Arbitrator.

(d) All papers connected with the arbitration shall be served on an opposing party either by personal service or United States mail, First Class, addressed to the party's attorney, or if the party is not represented by an attorney or the attorney cannot be located, to the last known address of the party.

ATTACHMENT D

MEDIATION PROTOCOLS

I. PARTICIPANTS

A. Interests Represented. Any interest that would be substantially affected by EPA's action in ________ [specify case] may be represented. Parties may group together into caucuses to represent allied interests.

B. Additional Parties. After negotiations have begun, additional parties may join the negotiations only with the concurrence of all parties already represented.

C. Representatives. A representative of each party or alternate must attend each full negotiating session. The designated representative may be accompanied by such other individuals as the representative believes is appropriate to represent his/her interest, but only the designated representative will have the privilege of sitting at the negotiating table and of speaking during the negotiations, except that any representative may call upon a technical or legal adviser to elaborate on a relevant point.

II. DECISIONMAKING

A. Agendas. Meeting agendas will be developed by consensus. Agendas will be provided before every negotiating session.

B. Caucus. A caucus can be declared by any participant at any time. The participant calling the caucus will inform the others of the expected length of the caucus.

III. SAFEGUARDS FOR THE PARTIES

A. Good Faith. All participants must act in good faith in all aspects of these negotiations. Specific offers, positions, or statements made during the negotiations may not be used by other parties for any other purpose or as a basis for pending or future litigation. Personal attacks and prejudiced statements are unacceptable.

B. Right to Withdraw. Parties may withdraw from the negotiations at any time without prejudice. Withdrawing parties remain bound by protocol provisions on public comment and confidentiality.

C. Minutes. Sessions shall not be recorded verbatim. Formal minutes of the proceedings shall not be kept.

D. Confidentiality and the Use of Information

(1) [All parties agree not to withhold relevant information. If a party believes it cannot or should not release such information, it will provide the substance of the information in some form (such as by aggregating data, by deleting non-relevant confidential information, by providing summaries, or by furnishing it to a neutral consultant to use or abstract) or a general description of it and the reason for not providing it directly.]

(2) [Parties will provide information called for by this paragraph as much in advance of the meetings as possible.]

(3) The entire process is confidential. The parties and the mediator will not disclose information regarding the process, including settlement terms, to third parties, unless the participants otherwise agree. The process shall be treated as compromise negotiation for purposes of the Federal Rules of Evidence and state rules of evidence. The mediator will be disqualified as a witness, consultant or expert in any pending or future action relating to the subject matter of the mediation, including those between persons not parties to the mediation. Failure to meet the confidentiality or press requirements of these protocols is a basis for exclusion from the negotiations.

IV. SCHEDULE

A. Time and location. Negotiating sessions will initially be held ______________ [insert how often]. The first negotiating session is scheduled for _______________. Unless otherwise agreed upon, a deadline of ______ months for the negotiations will be established. The location of the meetings will be decided by the participants.

B. Discontinue if unproductive. The participants may discontinue negotiations at any time if they do not appear productive.

V. Press

A. [Joint Statements. A joint press statement shall be agreed to by the participants at the conclusion of each session. A joint concluding statement shall be agreed to by the participants and issued by the mediator at the conclusion of the process. Participants and the mediator shall respond to press inquires within the spirit of the press statement agreed to at the conclusion of each session.]

B. [Meetings with the Press. Participants and the mediator will strictly observe the protocols regarding confidentiality in all contacts with the press and in other public forums. The mediator shall be available to discuss with the press any questions on the process and progress of the negotiations. No party will hold discussions with the press concerning specific offers, positions, or statements made during the negotiations by any other party.]

VI. MEDIATOR

A neutral mediator will work with all the parties to ensure that the process runs smoothly.

VII. APPROVAL OF PROPOSALS

A. Partial Approval. It is recognized that unqualified acceptance of individual provisions is not possible out of context of a full and final agreement. However, tentative agreement of individual provisions or portions thereof will be signed by initialing of the agreed upon items by the representatives of all interests represented. This shall not preclude the parties from considering or revising the agreed upon items by mutual consent.

B. Final Approval. Upon final agreement, all representatives shall sign and date the appropriate document. It is explicitly recognized that the representatives of the U.S. EPA do not have the final authority to agree to any terms in this case. Final approval must be obtained from ________________ [insert names of proper officials].

VIII. EFFECTIVE DATE

These protocols shall be effective upon the signature of the representatives.

For the U.S. Environmental Protection Agency

______________________ Signature ______________________ Date

For ______________________ [Name of violator]

______________________ Signature ______________________ Date

Attachment E

AGREEMENT TO INSTITUTE MINI-TRIAL PROCEEDINGS

The United States Environmental Protection Agency (EPA) and XYZ Corporation, complainant and respondent, respectively, in the matter of XYZ Corp., Docket No. _________, agree to the alternative dispute resolution procedure set forth in this document for the purpose of fostering the potential settlement of this case. This agreement, and all of the actions that are taken pursuant to this agreement, are confidential. They are considered to be part of the settlement process and subject to the same privileges that apply to settlement negotiations.

1. The parties agree to hold a mini-trial to inform their management representatives of the theories, strengths, and weaknesses of the parties' respective positions. At the mini-trial, each side will have the opportunity and responsibility to present its "best case" on all of the issues involved in this proceeding.

2. Management Representatives of both parties, including an EPA official and an XYZ official at the Division Vice President level or higher, will attend the mini-trial. The representatives have authority to settle the dispute.

3. A mutually selected "Neutral Advisor" will attend the mini-trial. The Neutral Advisor will be chosen in the following manner. By __________, [insert date] the parties shall exchange a list of five potential Neutral Advisors

selected from the list of candidates offered by ______________ [insert neutral organization]. The potential candidates shall be numbered in order of preference. The candidate who appears on both lists and who has the lowest total score shall be selected as the Neutral Advisor. If no candidate appears on both lists, the parties shall negotiate and shall select and agree upon a Neutral Advisor by _______________ [insert date].

4. The fees and expenses of the Neutral Advisor will be borne equally by both parties. [However, if the Neutral Advisor provides an opinion as to how the case should be resolved, and a party does not follow the recommended disposition of the Neutral Advisor, that party shall bear the Advisor's entire fees and expenses.]

5. Neither party, nor anyone on behalf of either party, shall unilaterally approach, contact or communicate with the Advisor. The parties and their attorneys represent and warrant that they will make a diligent effort to ascertain all prior contact between themselves and the Neutral Advisor, and that all such contacts will be disclosed to counsel for the opposing party.

6. Within 10 days after the appointment of the Neutral Advisor, mutually agreed upon basic source material will be

jointly sent to the Neutral Advisor to assist him or her in familiarizing himself or herself with the basic issues of the case. This material will consist of neutral matter including this agreement, the complaint and answer, the statute, any relevant Agency guidance, a statement of interpretation and enforcement policy, the applicable civil penalty policy, and any correspondence between the parties prior to the filing of the complaint.

7. All discovery will be completed in the _________ [insert number] working days following the execution of this agreement. Neither party shall propound more than 25 interrogatories or requests for admissions, including subparts; nor shall either party take more than five depositions and no deposition shall last more than three hours. Discovery taken during the period prior to the mini-trial shall be admissible for all purposes in this litigation, including any subsequent hearing before [a federal judge or administrative law judge] in the event this mini-trial does not result in a resolution of this dispute. It is agreed that the pursuit of discovery during the period prior to the mini-trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the mini-trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In that event, the partial

depositions taken during this interim period shall in no way foreclose additional depositions of the same individual regarding the same or additional subject matter for a later hearing.

8. By _________________, [insert date] the parties shall exchange all exhibits they plan to use at the mini-trial, and send copies at the same time to the Neutral Advisor. On the same date the parties also shall exchange and submit to the Neutral Advisor and to the designated trial attorney for the opposing side: (a) introductory statements no longer than 25 double-spaced pages (not including exhibits), (b) the names of witnesses planned for the mini-trial, and (c) all documentary evidence proposed for utilization at the mini-tial.

9. Two weeks before the mini-trial, if he or she so desires and if the parties agree, the Neutral Advisor may confer jointly with counsel for both parties to resolve any outstanding procedural questions.

10. The mini-trial proceeding shall be held on ___________, and shall take ____ day(s). The morning proceedings shall begin at ____ a.m. and shall continue until _____ a.m. The afternoon's proceedings shall begin at _____ p.m. and continue until _____ p.m. A sample two day schedule follows:

Day 1

8:30 a.m. - 12:00 Noon	EPA's position and case presentation
12:00 Noon - 1:00 p.m.	Lunch*
1:00 p.m. - 2:30 p.m.	XYZ's cross-examination
2:30 p.m. - 4:00 p.m.	EPA's re-examination
4:00 p.m. - 5:00 p.m.	Open question and answer period

Day 2

8:30 a.m - 12:00 Noon	XYZ's position and case presentation
12:00 Noon - 1:00 p.m.	Lunch*
1:00 p.m. - 2:30 p.m.	EPA's cross-examination
2:30 p.m. - 3:00 p.m.	XYZ's re-examination
3:00 p.m. - 4:30 p.m.	Open question and answer period
4:30 p.m. - 4:45 p.m.	EPA's closing argument
4:45 p.m. - 5:00 p.m.	XYZ's closing argument

*Flexible time period for lunch of a stated duration.

11. The presentations at the mini-trial will be informal. Formal rules of evidence will not apply, and witnesses may provide testimony in the narrative. The management representatives may question a witness at the conclusion of the witness' testimony for a period not exceeding ten minutes per witness. In addition, at the conclusion of each day's presentation, the management repesentatives may ask any further questions that they deem appropriate, subject to the time limitations specified in paragraph 10. Cross-examination will occur at the conclusion of each party's direct case presentation.

12. At the mini-trial proceeding, the trial attorneys will have complete discretion to structure their presentations as desired. Forms of presentation include, but are not limited to, expert witnesses, lay witnesses, audio visual aids, demonstrative evidence, and oral argument. The parties agree that there will be no objection by either party to the form or content of the other party's presentation.

13. In addition to asking clarifying questions, the Neutral Advisor may act as a moderator. However, the Neutral Advisor will not preside like a judge or arbitrator, nor have the power to limit, modify or enlarge the scope or substance of the parties' presentations. The presentations will not be recorded, but either party may take notes of the proceedings.

14. In addition to counsel, each management representative may have advisors in attendance at the mini-trial, provided that all parties and the Neutral Advisor shall have been

notified of the identity of such advisors at least ten days before commencement of the mini-trial.

15. At the conclusion of the mini-trial, the management representatives shall meet, by themselves, and shall attempt to agree on a resolution of the dispute. By agreement, other members of their teams may be invited to participate in the meetings.

16. At the request of any management representative, the Neutral Advisor will render an oral opinion as to the likely outcome at trial of each issue raised during the mini-trial. Following that opinion, the management representatives will again attempt to resolve the dispute. If all management representatives agree to request a written opinion on such matters, the Neutral Advisor shall render a written opinion within 14 days. Following issuance of any such written opinion, the management representatives will again attempt to resolve the dispute.

17. If the parties agree, the [adminstrative law judge or federal district court judge] may be informed in a confidential communication that an alternative dispute resolution procedure is being employed, but neither party shall inform the [administrative law judge or federal district court judge] at any time as to any aspect of the mini-trial or of the Advisor. Furthermore, the parties may file a joint motion to suspend proceedings in the ___________ [appropriate court] in this case. The motion shall advise the court that the suspension

is for the purpose of conducting a mini-trial. The court will be advised as to the time schedule established for completing the mini-trial proceedings. Written and oral statements made by one party in the course of the mini-trial proceedings cannot be utilized by the other party and shall be inadmissible at the hearing of this matter before the [administrative law judge or federal district court judge] for any purpose, including impeachment. However, documentary evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the mini-trial.

18. Any violation of these rules by either party will seriously prejudice the opposing party and be _prima facie_ grounds for a motion for a new hearing; and to the extent that the violation results in the communication of information to the [administrative law judge or federal district court judge] contrary to the terms of this agreement, it shall be _prima facie_ grounds for recusal of the [administrative law judge or federal district court judge]. Moreover, notwithstanding the provisions of Paragraph 4 above, any violation of these rules by either party will entitle the opposing party to full compensation for its share of the Neutral Advisor's fees and expenses, irrespective of the outcome of any administrative or court proceeding.

19. The Neutral Advisor will be disqualified as a hearing witness, consultant, or expert for either party, and his or her advisory response will be inadmissible for all purposes in

this or any other dispute involving the parties. The Neutral Advisor will treat the subject matter of the presentations as confidential and will refrain from disclosing any trade secret information disclosed by the parties. After the Advisor renders his or her opinion to the parties, he or she shall return all materials provided by the parties (including any copies) and destroy all notes concerning this matter.

Dated: ________________________ Dated: ________________________

By: ________________________
Attorney for United States Environmental Protection Agency

By: ________________________
Attorney for XYZ Corporation

Affirmation of Neutral Advisor:

I agree to the foregoing provisions of this Alternative Dispute Resolution Agreement.

Dated: ________________________

Signed: ________________________
Neutral Advisor

Attachment F

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In the Matter of	)	
	)	
XYZ Corporation,	)	Docket No.
	)	
Respondent	)	

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

A. General Provisions
  1. Purpose
  2. Definitions

B. Guidelines for Conduct of Neutral Factfinding
  1. Scope and Applicability
  2. Jurisdiction of Neutral Factfinder
  3. Selection of Neutral Factfinder
  4. Information Regarding Dispute
  5. Determination of Neutral Factfinder
  6. Confidentiality
  7. Appeals Procedures
  8. Administrative Fees, Expenses, and Neutral Factfinder's Fee
  9. Miscellaneous Provisions

A. GENERAL PROVISIONS

1. Purpose

This agreement contains the procedures to be followed for disputes which arise over ___________ [state issue(s)].

2. Definitions

Terms not defined in this section have the meaning given by __________________ [state applicable statute(s) and section(s)]. All time deadlines in these alternative dispute resolution (ADR) procedures are specified in calendar days. Except when otherwise specified:

(a) "Act" means [state applicable statute(s) and citation in U.S. Code].

(b) "NAO" means any neutral administrative organization selected by the parties to administer the requirements of the ADR procedures.

(c) "Neutral Factfinder" means any person selected in accordance with and governed by the provisions of these ADR procedures.

(d) "Party" means EPA and the XYZ Corporation.

B. GUIDELINES FOR CONDUCT OF NEUTRAL FACTFINDING

1. Scope and Applicability

The ADR procedures established by this document are for disputes arising over _______________ [state issue(s)].

2. Jurisdiction of Neutral Factfinder

In accordance with the ADR procedures set forth in this discument, the Neutral Factfinder is authorized to issue determinations of fact regarding disputes over ___________

___________________ [state issue(s)], and any other issues authorized by the parties.

3. Selection of Neutral Factfinder

The Neutral Factfinder will be chosen by the parties in the following manner.

(a) The parties shall agree upon a neutral administrative organization (NAO) to provide services to the parties as specified in these ADR procedures. The parties shall jointly request the NAO to provide them with a list of three to five (3-5) potential Neutral Fact-finders. Either party may make recommendations to the NAO of qualified individuals. Within ten (10) days after the receipt of the list of potential Neutral Factfinders, the parties shall numerically rank the listed individuals in order of preference and simultaneously exchange such rankings. The individuals with the three (3) lowest combined total scores shall be selected as finalists. Within ten (10) days after such selection, the parties shall arrange to meet with and interview the finalists. Within ten (10) days after such meetings, the parties shall rank the finalists in order of preference and exchange rankings. The individual with the lowest combined total score shall be selected as the Neutral Factfinder.

(b) The NAO shall give notice of the appointment of the Neutral Factfinder to each of the parties. A signed acceptance by the Neutral Factfinder shall be filed with the NAO prior to the initiation of Factfinding proceedings.

(c) If the Neutral Factfinder should resign, die, withdraw, or be disqualified, unable, or refuse to perform the duties of the office, the NAO may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of this section, and the dispute shall be reinitiated, unless the parties agree otherwise.

4. Information Regarding Dispute

(a) Within ten (10) days after the selection of the Neutral Factfinder, basic source material shall be jointly submitted to the Neutral Factfinder by the parties. Such basic source material shall consist of:

1) an agreed upon statement of the precise nature of the dispute,

2) the position of each party and the rationale for it,

3) all information and documents which support each party's position, and

4) ____________ [describe additional material].

(b) Thereafter, for a period of __________ days, the Neutral Factfinder shall conduct an investigation of the issues in dispute. As part of such investigation, the Neutral Factfinder may interview witnesses, request additional documents, request additional information by written questions, and generally use all means at his or her disposal to gather the facts relevant to the disputes as he or she determines. The Neutral Factfinder shall be the sole determiner of the relevancy of information. Conformity to formal rules of evidence shall not be necessary.

5. Determination of Neutral Factfinder

(a) The Neutral Factfinder shall render a determination within _________ days of the time limitation specified in Section B. 4(b) above, unless:

(1) Both parties agree in writing to an extension; [or

(2) The Neutral Factfinder determines that an extension of the time limit is necessary.]

(b) The determination of the Neutral Factfinder shall be signed and in writing. It shall contain a full statement of the basis and rationale for the Neutral Factfinder's determination.

(c) If the parties settle their dispute prior to the determination of the Neutral Factfinder, the Neutral Factfinder shall cease all further activities in regard to the dispute upon receipt of joint notice of such settlement from the parties.

(d) The parties shall accept as legal delivery of the determination the placing of a true copy of the decision in the mail by the Neutral Factfinder, addressed to the parties' last known addresses or their attorneys, or by personal service.

(e) After the Neutral Factfinder forwards his or her determination to the parties, he or she shall return all dispute-specific information provided by the parties (including any copies) and destroy notes concerning this matter.

6. Confidentiality

(a) The determination of the Neutral Factfinder, and all of the actions taken pursuant to these ADR procedures, shall be confidential and shall be entitled to the same privileges that apply generally to settlement negotiations.

(b) The Neutral Factfinder shall treat the subject matter of all submitted information as confidential, and shall refrain from disclosing any trade secret or confidential business information disclosed as such by the parties. [If XYZ has previously formally claimed information as confidential business information (CBI), XYZ shall specifically exclude the information from such CBI classification for the limited purpose of review by the Neutral Factfinder.]

(c) No determination of the Neutral Factfinder shall be admissible as evidence of any issue of fact or law in any proceeding brought under any provision of [state statute] or any other provision of law.

7. Appeals Procedures

(a) Any party may appeal the determination of the Neutral Factfinder within thirty days of notification of such determination. Any such appeal shall be made to the [Chief Judicial Officer, U.S. Environmental Protection Agency, or district court judge].

(b) The determination of the Neutral Factfinder shall be binding and conclusive, and shall not be overturned unless achieved through fraud, misrepresentation, other misconduct by the Neutral Factfinder or by any of the parties, or mutual mistake of fact. The [administrative law judge or federal district court judge] shall not have jurisdiction to review the determination unless there is a verified complaint with supporting affidavits filed by one of the parties attesting to specific instances of such fraud, misrepresentation, other misconduct, or mutual mistake of fact.

8. Administrative Fees, Expenses, and Neutral Factfinder's Fee

(a) The fees and expenses of the Neutral Factfinder, and of the NAO, shall be borne equally by the parties. The parties may employ additional neutral organizations to administer these ADR procedures as mutually deemed necessary, with the fees and expenses of such organizations borne equally by the parties.

(b) The NAO shall prescribe an Administrative Fee Schedule and a Refund Schedule. The schedules in effect at the time of the joint request for Factfinding shall be applicable.

The filing fee, if required, shall be advanced by the parties to the NAO as part of the joint request for Factfinding. If a matter is settled, a refund shall be made in accordance with the Refund Schedule.

(c) Expenses of providing information to the Neutral Factfinder shall be borne by the party producing such information.

(d) The per diem fee for the Neutral Factfinder shall be agreed upon by the parties and the NAO prior to the commencement of any activities by the Neutral Factfinder. Arrangements for compensation of the Neutral Factfinder shall be made by the NAO.

9. Miscellaneous Provisions

(a) Before the selection of the Neutral Factfinder, all oral or written communications from the parties for the Neutral Factfinder's consideration shall be directed to the NAO for eventual transmittal to the Neutral Factfinder.

(b) All papers connected with the Factfinding shall be served on the opposing party either by personal service or United States mail, First Class.

(c) The Neutral Factfinder shall be disqualified from acting on behalf of either party, and his or her determination pursuant to these ADR procedures shall be inadmissible for all purposes, in any other dispute involving the parties.

(d) Any notification or communication between the parties, or with and by the Neutral Factfinder shall be confidential and entitled to the same privileges that apply generally to settlement negotiations.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 2 1987

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Alternative Dispute Resolution in Enforcement Actions: Actions to Generate Support

TO:
Assistant Administrator for Water
Assistant Administrator for Solid Waste and Emergency Response
Assistant Administrator for Air and Radiation
Assistant Administrator for Pesticides and Toxic Substances
Regional Administrators

I. Purposes and Background

The purpose of this memorandum is to encourage the use of alternative dispute resolution (ADR) in EPA enforcement actions. I want to encourage your support and active participation in the promotion of this concept.

ADR is the use of third-party neutrals to aid in the resolution of all or part of a dispute. Examples of ADR techniques include arbitration, mediation, mini-trials and fact-finding. In recent years these techniques have gained increasing support and use in resolving private commercial disputes. EPA is already applying ADR in various contexts: negotiated rulemaking, certain Superfund sites where a facilitator is aiding negotiations between EPA and the community, and RCRA siting.

I am interested in expanding the use of these resolution techniques to the enforcement arena. The Office of Enforcement and Compliance Monitoring (OECM) has been investigating ADR's application to resolving enforcement disputes for over a year. This exploration has recently led to draft guidance on the use of ADR in enforcement cases, dated December 2, 1986 (copy attached). This guidance will govern the conduct of any ADR procedures undertaken before the issuance of final guidance.

As interest and support for ADR have grown within the Agency over the past several years, I have remained supportive of OECM's efforts in this area. We believe that ADR may enhance our ability to resolve enforcement cases in the same sense that negotiated rulemaking has been applied to our regulatory development process. ADR can be useful in resolving both large and small cases. It can breathe new life into stalled cases, and help find a path through complex technical issues. There is ample evidence that the regulated community is willing to consider the use of ADR techniques as a means of resolving enforcement cases.

II. Assistant Administrator Support

In order to more effectively promote the use of ADR in enforcement actions, I am asking that the Assistant Administrators invite knowledgeable OECM staff to join with them in a presentation on this topic at the next national meeting of key headquarters and regional managers. The presentation would review ADR applications which can contribute to the resolution of the kinds of problems that arise in each program's enforcement actions. I encourage Assistant Administrators to emphasize the importance of this presentation.

Finally, I urge Assistant Administrators to continue to cooperate with OECM on this project. AA's should encourage the Regions to review the enforcement cases in their respective programs and, in consultation with OECM and the Offices of Regional Counsel, identify cases for which ADR may be appropriate. Please refer specific inquiries about the use of ADR to OECM's Office of Enforcement Policy. I believe that a memorandum from the Assistant Administrators to their regional program division directors which encourages the identification of pilot ADR cases would foster regional support needed to gain experience in applying ADR to the resolution of enforcement disputes.

III. Regional Administrator Support

I urge Regional Administrators to actively seek out opportunities to apply ADR techniques. Each Region should review its enforcement caseload for referred cases which may meet the characteristics for case selection in the attached draft guidance. In addition, I encourage regions to consider whether ADR could enhance the prospects of resolution of matters either not yet referred to the Department of Justice or which will be administratively enforced. Following this analysis, the regions should consult with OECM on specific cases.

This initiative promises to save resources that otherwise would be devoted to the costly process of enforcement litigation. I welcome such innovative approaches to accomplishing our basic mission.

Lee M. Thomas

Attachment

cc: Assistant Administrator for Enforcement
and Compliance Monitoring
Regional Counsels
Regional Enforcement Contacts
Regional Program Division Directors

DEPARTMENT OF JUSTICE

Office of the Attorney General
Washington, D.C. 20530

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13 March 1986

MEMORANDUM

TO: All Assistant Attorneys General
All United States Attorneys

FROM: EDWIN MEESE III
Attorney General

SUBJECT: Department Policy Regarding Consent Decrees and Settlement Agreements

The following policy is adopted to guide government attorneys involved in the negotiating of consent decrees and settlements. Adopted pursuant to the Attorney General's litigation and settlement authority, these guidelines are designed to ensure that litigation is terminated in a manner consistent with the proper roles of the Executive and the courts. They are to be followed in all cases tried by counsel under the direction of the Attorney General.

I. General Policy on Consent Decrees and Settlement Agreements

Consent decrees are negotiated agreements that are given judicial imprimatur when entered as an order of the court. Because of their unique status as both contract and judicial act, consent decrees serve as a useful device for ending litigation without trial, providing the plaintiff with an enforceable order, and insulating the defendant from the ramifications of an adverse judgement. In the past, however, executive departments and agencies have, on occasion, misused this device and forfeited the prerogatives of the Executive in order to preempt the exercise of those prerogatives by a subsequent Administration. These errors sometimes have resulted in an unwarranted expansion of the powers of judiciary -- often with the consent of government parties -- at the expense of the executive and legislative branches.

The executive branch and the legislative branch may be unduly hindered by at least three types of provisions that have been found in consent decrees:

1. A department or agency that, by consent decree, has agreed to promulgate regulations, may have relinquished its power to amend those regulations or promulgate new ones without the participation of the court.

2. An agreement entered as a consent decree may divest the department or agency of discretion committed to it by the Constitution or by statute. The exercise of discretion, rather than residing in the Secretary or agency administrator, ultimately becomes subject to court approval or disapproval.

3. A department or agency that has made a commitment in a consent decree to use its best efforts to obtain funding from the legislature may have placed the court in a position to order such distinctly political acts in the course of enforcing the decree.

In Section II these guidelines address each of these concerns and limit authority to enter into consent decrees that would require the Secretary or agency administrator to revise, amend or promulgate regulations; that would require the Secretary or agency administrator to expend funds which Congress has not appropriated, or to seek appropriations from Congress; or that would divest the Secretary or the agency administrator of discretion granted by the Constitution or by statue.

These limitations on entry into consent decrees that might include such provisions are required by the executive's position, that it is constitutionally impermissible for the courts to enter consent decrees containing such provisions where the courts would not have had the power to order such relief had the matter been litigated.

The limitations in Section II.A. of the guidelines are not intended to discourage termination of litigation through negotiated settlements. The Attorney General has plenary authority to settle cases tried under his direction, including authority to enter into settlement agreements on terms that a court could not order if the suit were tried to conclusion. Settlement agreements -- similar in form to consent decrees, but not entered as an order of the court -- remain a perfectly permissible device for the parties and should be strongly encouraged. Section II.B., however, places some restrictions on the substantive provisions which may properly be included in settlement agreements. For example, Section II.B.1. allows a department or agency to agree in a settlement document to revise, amend, or promulgate new regulations, but only so long as the department or agency is not precluded from changing those regulations pursuant to the APA. Similarly, under Section II.B.2. the Secretary or agency administrator may agree to exercise his discretion in a particular manner, but may not divest himself entirely of the power to exercise that discretion as necessary in the future. The guidelines further provide that in certain circumstances where the agreement constrains agency discretion, a settlement agreement should specify that the only sanction for the government's failure to comply with a provision of a settlement agreement shall be the revival of the suit. Revival of the suit as the sole remedy removes the danger of a judicial order awarding damages or providing specific relief for breach of an undertaking in a settlement agreement.

Finally, it must be recognized that the Attorney General has broad flexibility and discretion in the conduct of litigation to respond to the realities of a particular case. Such flexibility can be exercised by the Attorney General in granting exceptions to this policy.

II. Policy Guidelines on Consent Decrees and Settlement Agreements

A. Consent Decrees

A department or agency should not limit its discretion by consent decree where it would assert that a similar limitation imposed by injunction unduly or improperly constrains executive discretion. In particular, the Department of Justice will not authorize any consent decree limiting department or agency authority in the following manner:

1. The department or agency should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations.

2. The department or agency should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization.

3. The department or agency should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

B. Settlement Agreements

The Department of Justice will not authorize any settlement agreement that limits the discretion of a department or agency in the following manner:

1. The department or agency should not enter into a settlement agreement that interferes with the Secretary or agency administrator's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act.

2. The department or agency should not enter into a settlement agreement that commits the Department or agency to

expend funds that Congress has not appropriated and that have not been budgeted for the action in question.

In any settlement agreement in which the Secretary or agency administrator agrees to exercise his discretion in a particular way, where such discretionary power was committed to him by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties, the sole remedy for the department or agency's failure to comply with those terms of the settlement agreement should be the revival of the suit.

C. Exceptions

The Attorney General does not hereby yield his necessary discretion to deal with the realities of any given case. If special circumstances require any departure from these guidelines, such proposed departure must be submitted for the approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General at least two weeks before the consent decree is to be entered, or the settlement agreement signed, with a concise statement of the case and of reasons why departure from these guidelines will not tend to undermine their force and is consistent with the constitutional prerogatives of the executive or the legislative branches. Written approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General will be required to authorize departure from these guidelines.

Office of the Attorney General
Washington, D.C. 20530

MEMORANDUM

TO: All Assistant Attorneys General
All United States Attorneys

FROM: EDWIN MEESE III
Attorney General

SUBJECT: Department Policy Regarding Special Masters

These guidelines are promulgated in order to give central direction to the government's positions in cases involving special masters. They set out the Department's policy on the use of masters, the criteria by which master appointments are to be assessed, and procedures which attorneys for the United States are to follow. For the first time, the Department of Justice here adopts a policy with respect to the costs of special masters in light of the doctrine of sovereign immunity. The guidelines are to be followed in all cases tried by counsel under the Attorney General's direction, except those in the Supreme Court of the United States and those in state courts under the McCarran Amendment, 43 U.S.C. § 666.

I. General Policy on the Use of Masters

It is the position of the Justice Department that, as a general matter, the judicial power vested by the Constitution in the courts is to be exercised by judges and their legislatively created subordinates, such as United States Magistrates. This policy accords with Rule 53 of the Federal Rules of Civil Procedure, under which the appointment of special masters and other non-legislative judicial delegees is to be considered the exception rather than the rule. Special masters are an acceptable aid to judicial officers in a narrow range of cases, but they are not a substitute for Article III judges.

The appropriate role for special masters is in situations where the demands on the decisionmaker's time are great but the need for judicial resolution is minimal. Masters can be useful where decisions are (1) routine, (2) large in number, (3) minimally connected to the substantive issues in a case, and (4) not sufficiently difficult or significant to require a constitutional or legislative officer. A principal example is the class of cases involving unusually extensive discovery proceedings, in which a large number of minor decisions must be made concerning questions such as discoverability and privilege. In situations of that sort, the special master is a legitimate and valuable part of the judicial process. Masters can also play a role in the remedial stage of a proceeding, where there is a need for monitoring of a judicial order clear enough to require no adjudicative decisions by the master.

The fact that masters are not substitutes for judges has several significant consequences:

1. Masters should not be employed simply to alleviate congestion or lighten workloads, if to do so would result in a master performing a judge's function. The appropriate level of staffing for the federal courts is a decision for Congress, not for individual judges. The fact that a case is large or complex, and thereby represents an above-average burden on scarce judicial resources, will generally mean that the judge should spend more time on the case, not that ad hoc officers should be appointed.

2. The fact that a case presents difficult technical issues should not be considered as weighing in favor of the appointment of a master. Hard factual problems are to be addressed through the normal techniques of trial, including the presentation of expert testimony. If necessary, the trial court can appoint its own expert witnesses. It is a serious error, however, for a master, who is a hearing officer and fact-finder, to be confused with someone who develops and presents evidence. Masters should not be appointed for this purpose, and their use as de facto experts should be resisted when it occurs.

3. Masters are not appropriate when their decisions will have to be reviewed by the judge in substantial detail. Such an arrangement is uneconomic and, more importantly, inadequately serves the right of litigants to have any significant question resolved in the first instance by a constitutional or statutory judicial officer.

4. Masters should not be employed as part of non-judicial alternative dispute resolution methods. The United States favors the use of alternative dispute resolution methods such as minitrials, arbitration and mediation. Insofar as these methods are not part of the judicial process proper, masters, who are ad hoc judicial officers, should not be used as neutral parties in such situations. And insofar as encouraging or facilitating alternative dispute resolution requires the judgment or authority of the court, it is not appropriate for master involvement because the use of masters should be restricted to more ministerial functions.

5. Masters should not be entrusted with issues that are novel, difficult, closely related to the outcome of the case, or significant from the point of view of policy. Such issues demand the attention of life-tenured judges who have gone through the rigorous process of judicial selection, and are insulated in their decisionmaking by the constitutional protections surrounding their office.

6. It is inappropriate for a court to use a master to extend its own power. Masters should not be a tool for bringing under the control of the court matters that otherwise would be resolved elsewhere. This is particularly important when the United States is a party, because in such cases the enhancement of judicial power will usually be at the expense of a coordinate branch of government.

7. Masters should be employed only in cases where their utility justifies the additional cost. Judges and magistrates are already made available at public expense, as a result of the decision that certain services are to be provided without cost to litigants. The imposition on the parties of additional expenses can be justified only by the prospect of a substantial increase in litigation efficiency; such an imposition merely to save the time of officers that Congress has determined shall be available to all is improper.

II. Procedures in Master Cases

A. The Decision on Appointment

1. Application of the Criteria

The Department of Justice favors the use of special masters only in the narrow class of lawsuits discussed above. Accordingly, before proposing to the court that a master be appointed, attorneys for the United States must analyze the case in light of the principles set out here. A master should be suggested only if counsel judge that (1) the case (or order to be implemented) contains enough of the routine, minor issues that are appropriate for master resolution to justify the additional expense and delay, and (2) it appears very unlikely that the master would function in an improper fashion. The same considerations will govern the response of counsel of the government to another party's suggestion that a master be employed.

2. Sua Sponte Appointments

The Department believes that courts should appoint masters on their own motion only after consultation with the parties. Accordingly, any time a judge raises the possibility that a master be appointed sua sponte, government counsel should request the opportunity to be heard on both the advisability of the appointment and the appropriate role of the master. When a court appoints a master without discussing the possibility beforehand, the United States will generally seek a reconsideration of the decision. This should be done even when we agree with the appointment, in order to encourage the court to make its reasons explicit and, if possible, to adopt the principles enunciated here. In the very exceptional case where a motion for reconsideration would seriously undermine the government's overall position, litigation strategy may dictate that a sua sponte appointment not be challenged at all.

3. Acquiescence in Appointments

Sound litigation strategy also may dictate that the government acquiesce in the appointment of a master even when the Department's policies would indicate opposition. Counsel may decide that a major concession by another party justifies such acquiescence, or that a clear intention by the judge that a master will be employed should not be resisted. Acquiescence should be the exception and not the rule, however, and should never occur when there is a significant danger that the master would perform essential judicial functions or operate significantly to increase the power of the court relative to that of another branch or level of government.

B. Selection of the Master

1. Procedures

Because a special master is an ad hoc officer appointed for a particular case and paid for by the litigants, selection of the individual who is to act as a special master should be as much in the hands of the parties as feasible. Whenever possible, the parties should consult together and agree on a master, or on a list of suggested names. Similarly, the litigants should have an opportunity to comment on any candidate the court is considering, and may request the judge to invite comments on several possible masters. Unless case-specific considerations strongly dictate otherwise, the United States will press for the exercise of these procedural rights. When a judge simultaneously announces his decision to appoint a master and the name of the individual who is to serve, the government will usually request that the appointment be reconsidered along with the decision to make it, and will then comment on the prospective master as well as on the advisability of using one.

2. Criteria for Selection

a. Qualifications. In choosing or commenting on proposed masters, the United States will be guided primarily by considerations of technical competence and impartiality. A master is a hearing officer, not an expert. Therefore, while it is not always vital that a master be closely conversant with the subject matter of the case, it is necessary that he be thoroughly familiar with any procedural questions he is to handle -- privilege issues, for instance.

b. Independence. It is also important that the master be unbiased, not only as between the parties, but in his relationship with the judge: it is the duty of both the master and the judge to disclose to the parties any personal or business association between them that might impair this independence of judgment. Moreover, the master should exercise his independent judgment, and the judge should review the master's decisions on the merits. Accordingly, the United States must examine carefully the likely impartiality of any prospective master who is a close associate of the judge making the appointment.

c. Cost. Economy must also be considered in assessing possible masters. Individuals whose time is expensive, or who operate in institutions the services of which are costly, are to be avoided in favor of similarly qualified and unbiased candidates who will involve less expense.

d. Improper Role. Finally, in analyzing a candidate's desirability, counsel should take into account any indications that he would diverge from the appropriate role of the master. Any reason to believe that the master would wish to exercise significant judicial power, or would be disposed to seek to aggrandize the authority of the court, must weigh against the candidate.

Generally, the government will consider first United States Magistrates and semi-active judges, whose qualifications under these criteria will tend to be strong.

3. Implementation by Divisions

In implementing these guidelines, each litigating division of the Department shall decide whether its work involves masters often enough to warrant a review of possible candidates. It is anticipated that the Civil Division, Civil Rights Division, and Land and Natural Resources Division will probably find such a review appropriate; others may also. These divisions shall develop, by [three months after effective date of guidelines], specific criteria of acceptability along the lines outlined here and shall, if the Assistant Attorney General finds it appropriate, prepare lists of possible appointees who would probably be acceptable to the Department in cases of various kinds. Division heads shall establish mechanisms to ensure that government litigators in cases that may involve masters have these criteria and lists available at the earliest possible stage. These mechanisms shall be reported to the Deputy and Associate Attorneys

General and the other litigating divisions by [four months after effective date].

C. Statement of Masters' Functions

These guidelines delineate the functions of masters that the Department of Justice believes to be appropriate. It is important that, whenever a master is appointed, his role in the case be made explicit at the outset. Accordingly, the United States will always propose a clear statement of the work the master is to do, and, if appropriate, a reference to the functions he is not to undertake. Whenever possible, the parties should agree to such a statement and submit their agreement to the judge. When this is not feasible, the government will urge the court to make an explicit statement of function. The United States will press for a mandate for the master consistent with these policies.

It is also important that clear provision be made at the outset for fees and expenses. The parties should agree to, or the court should adopt after comment, an understanding as to the master's billing rate, his authority to employ assistants and their rate of compensation, the expenses that will be allowed, and any other funding matter, including the procedures that are to be used to monitor and verify spending. The United States will always resist any expenditures by the master in the absence of such an understanding. Of course, the government will also insist that the master be allowed only such expenses as are necessary to effective operation. Litigating divisions that employ masters frequently, by [2 months after effective date], should establish more specific guidelines concerning proper categories and levels of expenditures.

D. Monitoring

Throughout any litigation involving a special master, government counsel shall pay close attention to the master's conduct of his office. Any deviation from the role assigned by the court, or the role endorsed for masters in general under these guidelines, should be reviewed with appropriate officers of the Department and should generally be brought to the attention first of the master and then of the court if that proves necessary. If this deviation persists in the face of objection by the government, serious considerations will be given to a motion to remove the particular master or to revoke the order of reference altogether.

Similarly, financial accountability must be maintained during the case. Counsel generally should raise immediately any doubts concerning the level or types of expenditure being made by the master. Frequently, of course, other parties (on both sides) will have interests similar to the government's, and should be consulted when cost issues arise.

III. Payments of Masters' Costs by the United States

The United States are sovereign, and are subject to suit only by their own consent. Courts will assess judgments against the sovereign only on a showing of an explicit and unequivocal waiver of this immunity. The fees and expenses of special masters are a cost of court, paid by parties pursuant to judgments; Congress has not enacted legislation generally waiving sovereign immunity with respect to this category of costs. Accordingly, except in cases where there is a specific statutory waiver that covers the costs of special masters, the United States may not be compelled to pay them. These principles are elaborated on in the first attached memorandum from the Office of Legal Counsel.

The government may elect, nevertheless, voluntarily to pay some or all of the costs of a master in a particular case (this point is elaborated on in the second attached memorandum from the Office of Legal Counsel). When the United States proposes a special master, or agrees to one proposed by another party or the court, arrangements will be made for the government to pay its proper share. Counsel may enter into an agreement under which each party will pay some portion of the costs approved by the court, or may provide that the losing party or parties will pay all of the master's expenses.

When a master is appointed over the government's objection, or with the government's acquiescence in a situation where these guidelines would normally call for opposition to appointment, the United States will refuse to pay any fees or expenses, and will notify the court of that refusal and the grounds therefore, when:

(1) government counsel believe the master to be unqualified or seriously biased;

(2) it appears clear that the master will be performing essential judicial functions with respect to issues closely related to the outcome of the case or sensitive from the point of view of policy;

(3) there is strong reason to believe that the use of the master will increase the authority of the court over another branch or level of government in derogation of constitutional principles; or

(4) the master's work will clearly have to be reviewed by the judge to such an extent as to render the master largely redundant.

Subject to procedures and policies established by the heads of litigating divisions, the United States may refuse to pay a master's costs for any other reason comparable in importance to those set out here. The decision not to pay for an officer the court has appointed should be approved by the responsible Assistant Attorney General.

Only in the rarest of cases will litigation strategy lead to a payment in a case where these guidelines dictate otherwise. While litigators usually will be disinclined to offend the judge conducting their proceedings, the United States must be willing to rely on the judiciary's ability to put aside unrelated irritations in making substantive decisions. Refusal to pay for a court-appointed master should always be explained carefully, with stress laid on the gravity of the considerations that have led to the decision, and on the imperative nature of Department policy as set forth here.

IV. Internal Procedures for Payment

Once a special master has been appointed, and the government has determined that the appointment is appropriate or that the government will acquiesce and pay its share of the fees and expenses of the master, the government attorney will submit an obligation of payment form to the administrative office for the division or U.S. Attorney's office. Until the Justice Management Division prescribes a form for special masters, OBD-47, "Request and Authorization for Fees and Expenses of Witnesses," will be used. The attorney should note on the form that it is being used for a special master. The division administrative officer will forward the OBD-47 to Financial Operations Services; administrative officers for U.S. Attorneys' offices, to the U.S. Marshal's office for that district.

Internal procedures for paying the master will follow the same procedures used for payment to experts and consultants. The master will submit an itemized invoice (OBD-84 and 85, "Pay Voucher for Special Services," may be used for this purpose) to the government attorney who, in turn, will submit the invoice to the administrative officer to be forwarded either to Financial Operations Services or the U.S. Marshal's office, as prescribed above. Upon the order of the court, partial or advance payment of fees and expenses will be handled through these same procedures.

Fees and expenses of Land Commissioners will not be paid by the Department. Funds for the payment of Land Commissioners are appropriated to the Administrative Office of the U.S. Courts, and the commissioners should look to that office for their fees and expenses.

V. Review of These Guidelines

The principles set out here must be tested and reviewed in light of the Department's ongoing experience with special masters, and in particular its experience under these guidelines. Accordingly, as of this date, each Assistant Attorney General heading a division that uses masters will institute procedures for the analysis of cases involving masters, with special attention to the effect of these guidelines. Counsel in master cases should report any need for clarification or expanded coverage, and any difficulties with other parties or the courts that appear to result from the application of these policies. The Assistant Attorney General for Legislative and Intergovernmental Affairs will report on any congressional reaction. In order to coordinate review, the Litigation Strategy Working Group will continue to meet periodically to discuss masters issues; Assistant Attorneys General should call any significant court reactions to the guidelines to the Group's attention.

U.S. Department of Justice

Washington, D.C. 20530

MEMORANDUM

JUN 19 1986

TO: Commercial Litigation Branch Attorneys

FROM: Stuart E. Schiffer
Deputy Assistant Attorney General
Civil Division

SUBJECT: Alternative Dispute Resolution -- Mini-Trials

Mini-trials, a form of alternative dispute resolution, can be a less expensive, less time-consuming means of resolving disputes between the Government and private parties. It is our policy to encourage alternative means of resolving disputes when these goals can be achieved.

Attached is a statement of policy regarding the use of mini-trials. If you are responsible for a case that you believe is amenable to resolution by mini-trial, please consult with your reviewer.

Attachment

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JUN 19 1986

COMMERCIAL LITIGATION BRANCH POLICY CONCERNING THE USE OF MINI-TRIALS

I.

STATEMENT OF POLICY

It is the policy of the Commercial Litigation Branch of the Department of Justice to consider carefully and, where appropriate, implement methods for resolving disputes that are alternatives to judicial proceedings. In furtherance of that policy, the Branch will participate in mini-trials as a form of alternate dispute resolution. Branch attorneys are encouraged to assess cases assigned to them for the potential for resolution by mini-trial and are requested to forward requests for mini-trials from opposing counsel to obtain a decision by an appropriate Department of Justice official. Branch attorneys should make it clear to opposing counsel, however, that the Branch will not participate in a mini-trial unless appropriate Departmental officials, in the exercise of their discretion, determine that participation is appropriate and in the best interests of the Government.

II.

GENERAL

1. Definition. A mini-trial is a voluntary, expedited, nonjudicial procedure through which management officials for each party meet to resolve disputes.

2. Purpose. A mini-trial is intended to reduce the cost, disruption and delay associated with litigation.

3. Description. A mini-trial is not actually a trial; rather, it is a process designed to facilitate settlement by educating the parties' principals regarding the strengths and weaknesses of the positions of both parties. The process combines the salutary aspects of negotiation and litigation, using flexible procedures designed to meet the needs of each individual case.

4. Attributes. The following are characteristic of all mini-trials in which the Department will participate:

a. Involvement of Principals: Management officials with settlement authority (or with the authority to make a final recommendation as to settlement) for both parties participate directly.

b. Expedited Time Period: The time period allowed for a mini-trial is brief and deadlines are expedited.

c. Non-binding Discussions By Principals: At the close of the presentation, the principals meet by themselves to attempt to resolve the dispute. These discussions are not binding and may not be used by either party in any subsequent proceedings.

d. Informality: All proceedings are informal.

In addition, where appropriate, the parties may select a neutral advisor to provide advice to the management officials involved in the mini-trial.

III.

CRITERIA FOR SELECTING CASES

Cases likely to be governed by clear legal precedent are not good candidates for resolution by mini-trial. Cases which involve factual disputes, which do not depend upon the credibility of the witnesses, are preferred. Cases which are expected to establish important legal precedent and those which are clearly without merit do not lend themselves to resolution by mini-trial.

IV.

INITIATION OF PROCESS

The suggestion that a mini-trial be conducted may emanate from either party. If the non-governmental party requests a mini-trial, the Department's trial attorney is requested to submit that request, along with his or her recommendations and those of the interested agency, to his or her supervisor. If the Department's attorney, in the absence of a request by the non-governmental party, concludes that a mini-trial would be advantageous, he or she shall obtain the recommendations of the interested agency, obtain approval from appropriate supervisors and then propose this procedure to the opposing party. The opposing party will be supplied with a copy of this memorandum and will be advised that a written agreement between the parties is a prerequisite to initiating the procedure. The decision to participate in a mini-trial requires the approval of the Deputy Assistant Attorney General in charge of the Branch and is solely within the discretion of the Department.

V.

PARTICIPANTS

The Government's principal participant will be the Department of Justice official with settlement authority or, where that is not feasible, the official with the authority finally to recommend acceptance of a settlement. Usually, the official or officials within the interested agency or agencies with authority to make recommendations which are binding upon the agency or agencies will participate as a secondary principal for the Government.

The non-governmental party's principal participant must be a senior level management official who possesses authority to settle the dispute in the absence of litigation. Where possible, the official should be an individual who has not participated in preparing the case for litigation.

Each party will designate one representative who will be responsible for conducting the mini-trial and ensuring that procedures are followed. The Department's attorney of record will be the Government's representative.

Where appropriate, the parties may agree upon a neutral advisor to advise the management officials who participate in the mini-trial. The neutral advisor should be a person with either legal or substantive knowledge in a relevant field. The neutral advisor should have no prior involvement in the dispute or the litigation and must possess no interest in the result of the mini-trial. The neutral advisor and the parties must agree in advance that the neutral advisor will have no further involvement in the litigation should the mini-trial fail to result in a settlement.

VI.

THE MINI-TRIAL AGREEMENT

The mini-trial agreement is a written document, signed by the principals and the representatives, in which the parties agree to the procedures to be used. While each mini-trial agreement should be structured so as to meet the needs of each individual case, every agreement must contain specific expedited time limitations for each aspect of the procedure, a statement regarding the non-binding nature of the procedure, and an agreement that the parties will seek a suspension of proceedings in the pending litigation while the mini-trial process is continuing. The mini-trial agreement will be negotiated by the representatives, with the approval of the principals. A sample mini-trial agreement is Appendix A to this memorandum.

VII.

PROCEDURES

While the procedures to be used are subject to negotiation and should be designed to meet the needs of each individual case, the following procedures are generally considered to be appropriate:

a. Time Limits: Time limitations are to be explicit, brief and strictly observed.

b. Discovery: Discovery procedures should be expedited and should be the subject of a specific provision contained in the mini-trial agreement. The parties should consider including in the agreement a limitation upon the scope of discovery as well as the number and length of depositions and interrogatories. Discovery conducted prior to the initiation of mini-trial procedures shall not be duplicated during the mini-trial process. A nongovernmental party may not conduct discovery under the mini-trial agreement if it has pending a request or requests for disclosure of information under the Freedom of Information Act. The mini-trial agreement should normally provide that discovery shall be completed at least two weeks prior to the mini-trial.

c. Written Submittals: The parties should normally provide for an exchange of written submittals prior to the mini-trial. The mini-trial agreement should set forth the timing, format and length of the submittals. The written submittal of the nongovernmental party must include an analysis of its quantum claim which includes information regarding the source of the figures. At the time the written submittals are exchanged, the parties should also exchange exhibit lists and, if applicable, witness lists.

d. Location of the Mini-Trial: The location of the mini-trial shall be specified in the mini-trial agreement. Government facilities may be used; the Government will not agree to pay any part of a fee charged for the use of nongovernmental facilities.

e. Manner of Presentation at the Mini-Trial: The allocation of the time agreed upon for presentation of the case to the principals shall be set forth in the mini-trial agreement. The presentation should exceed one day only in exceptional circumstances. The time allotted to each representative may be used as that representative desires, including examination of or presentations by witnesses, demonstrative evidence and oral argument. Recording or verbatim transcription of the testimony shall not be allowed. The mini-trial agreement may provide for an opportunity for the principals to examine any witnesses.

f. Neutral Advisor: The parties may agree that a neutral advisor shall be present during the mini-trial in order to provide an opinion, upon request, to the principals on any issue upon which the parties agree in advance. The neutral advisor should be selected by agreement of the parties. The advisor should be a person with legal and/or relevant substantive knowledge and should be a person who has had no prior involvement in the dispute or the litigation. The parties shall agree in advance upon the amount of compensation to be paid to the neutral advisor and the manner in which this compensation shall be paid. The neutral advisor shall agree in advance that he or she will have no further involvement in the case should the mini-trial fail to dispose of the litigation.

g. Settlement Discussions: The principals shall meet immediately following presentation of the mini-trial to discuss the possibility of settling the claim. This meeting shall be private, although the mini-trial agreement may provide that each principal may designate an individual to act as his or her technical advisor. This individual may not be the party's representative. A principal may consult with his or her attorneys, although they may not take part in the discussions regarding settlement.

h. Confidentiality: The discussion which takes place between the principals shall not be used for any purpose in any subsequent litigation.

i. Termination: Any party may terminate mini-trial proceedings at any time.

APPENDIX A

MINI-TRIAL AGREEMENT
BETWEEN THE
UNITED STATES
AND
____

This mini-trial agreement dated this _____ day of _____________, 19__, is executed by ____[name]______, ____[title]____, on behalf of the United States and by ______[name]_______, on behalf of ____[name of plaintiff]____, hereinafter referred to as plaintiff.

WHEREAS: On the _____ day of __________, 19__, plaintiff and the United States entered into Contract No. _____________________ ____for the ____ ____;

WHEREAS, under the Contract Disputes Act of 1978, plaintiff on ________________, 19__, filed a suit in the United States Claims Court alleging ____ ____ ____ _____________________________________;

WHEREAS, the United States and plaintiff have agreed to submit __[name of case]__ No. __[docket no.]__ to a "Mini-Trial";

NOW THEREFORE, subject to the terms and conditions of this "Mini-Trial" agreement, the parties mutually agree as follows:

1. The United States and plaintiff will voluntarily engage in a non-binding mini-trial on the issue of ____.

The mini-trial will be held on ______________________, 19__, at __[time of day]__ at ______[location]______.

2. The purpose of this mini-trial is to inform the principal participants of the position of each party on the claim and the underlying bases of the parties' positions. It is agreed that each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum.

3. The principal participants for the purpose of this mini-trial will be _____________________________________ for the United States and ____________________________ for plaintiff. The principal participants have the authority to settle the dispute or to make a final recommendation concerning settlement. Each

party will present its position to the principal participants through that party's designated representative, ______________, for the United States, and _____________, for plaintiff.

4. The parties have agreed that _____________________ shall serve as a neutral advisor to the principals. The neutral advisor shall be compensated as set forth in a separate agreement with the advisor. The advisor has warranted that he or she has had no prior involvement with this dispute or litigation and has agreed that he or she will not participate in the litigation should the mini-trial fail to resolve the dispute.

The neutral advisor shall participate in the mini-trial proceedings and shall render an opinion, upon request, on the following issues: ____

____

____. NOTE: This clause is to be used only if the parties have agreed that the participation of a neutral advisor would be useful.

5. All discovery will be completed in the twenty working days following the execution of this agreement. Neither party shall propound more than 25 interrogatories or requests for admissions, including subparts; nor shall either party take more than five depositions and no deposition shall last more than three hours. Discovery taken during the period prior to the mini-trial shall be admissible for all purposes in this litigation,

including any subsequent hearing before any board or competent authority in the event this mini-trial does not result in a resolution of this appeal. It is agreed that the pursuit of discovery during the period prior to the mini-trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the mini-trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In that event, the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual into the same or additional subject matter for a later hearing.

6. No later than _____ weeks prior to commencement of the mini-trial, the plaintiff shall submit to the United States a quantum analysis which identifies the costs associated with the issues that will arise during the mini-trial and which identifies the source of all data.

7. The presentations at the mini-trial will be informal. The rules of evidence will not apply, and witnesses may provide testimony in narrative form. The principal participants may ask any questions of the witnesses. However, any questioning by the principals, other than that occurring during the period set

aside for questions, shall be charged to the time period allowed for that party's presentation of its case as delineated in paragraph 9.

8. At the mini-trial proceeding, the representatives have the discretion to structure their presentations as desired. The presentation may include the testimony of expert witnesses, the use of audio visual aids, demonstrative evidence, depositions, and oral argument. The parties agree that stipulations will be utilized to the maximum extent possible. Any complete or partial depositions taken in connection with the litigation in general, or in contemplation of the mini-trial proceedings, may be introduced at the mini-trial as information to assist the principal participants to understand the various aspects of the parties' respective positions. The parties may use any type of written material which will further the progress of the mini-trial. The parties may, if desired, no later than _____ weeks prior to commencement of the mini-trial, submit to the representatives for the opposing side a position paper of no more than 25 - 8 1/2" X 11" double spaced pages. No later than ___ week(s) prior to commencement of the proceedings, the parties will exchange copies of all documentary evidence proposed for use at the mini-trial and a list of all witnesses.

9. The mini-trial proceedings shall take one day. The morning's proceedings shall begin at ____ a.m. and shall continue until _____ a.m. The afternoon's proceedings shall begin at ____ p.m. and continue until ____ p.m. (A sample schedule follows.)

SCHEDULE

9:00 a.m. - 10:00 a.m.	Plaintiff's position and case presentation.
10:00 a.m. - 11:00 a.m.	United States' cross-examination.
11:00 a.m. - 11:30 a.m.	Plaintiff's rebuttal.
11:30 a.m. - 12:00 noon	Open question and answer period.
12:00 noon - 1:00 p.m.	Lunch
1:00 p.m. - 2:00 p.m.	United States' position and case presentation.
2:00 p.m. - 3:00 p.m.	Plaintiff's cross-examination.
3:00 p.m. - 3:30 p.m.	United States' rebuttal.
3:30 p.m. - 4:00 p.m.	Open question and answer period.
4:00 p.m. - 4:30 p.m.	Plaintiff's closing argument.
4:30 p.m. - 5:00 p.m.	United States' closing argument.

10. Within ____ day(s) following the termination of the mini-trial proceedings, the principal participants should meet, or confer, as often as they shall mutually agree might be productive for resolution of the dispute. If the parties are unable to resolve the dispute within ____ days following

completion of the mini-trial, the mini-trial process shall be deemed terminated and the litigation will continue.

11. No transcript or recording shall be made of the mini-trial proceedings. Except for discovery undertaken in connection with this mini-trial, all written material prepared specifically for utilization at the mini-trial, all oral presentations made, and all discussions between or among the parties and/or the advisor at the mini-trial are confidential to all persons, and are inadmissible as evidence, whether or not for purposes of impeachment, in any pending or future court or board action which directly or indirectly involves the parties and the matter in dispute. However, if settlement is reached as a result of the mini-trial, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement. Furthermore, evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the mini-trial.

12. Each party has the right to terminate the mini-trial at any time for any reason whatsoever.

13. Upon execution of this mini-trial agreement, if mutually deemed advisable by the parties, the United States and the plaintiff shall file a joint motion to suspend proceedings in the Claims Court in this case. The motion shall advise the

court that the suspension is for the purpose of conducting a mini-trial. The court will be advised as to the time schedule established for completing the mini-trial proceedings.

DATED ______________________	DATED ______________________
BY: ________________________	BY: ________________________
Principal participant for the United States	Principal participant for ______________________
________________________	________________________
Attorney for the United States	Attorney for ________________

U.S. Department of Justice
Office of Legal Policy

Assistant Attorney General
Washington, D.C. 20530

MEMORANDUM

August 28, 1985

TO: William P. Tyson
Director
Executive Office for United States Attorneys

FROM: James M. Spears
Acting Assistant Attorney General

SUBJECT: Department Policy with Respect to Local Court Rules Requiring Mandatory Arbitration

Attached is a copy of the Department's policy with respect to local court rules requiring mandatory arbitration, as approved by the Deputy Attorney General. Please arrange for it to be included in the next U.S. Attorneys' Bulletin. I have already forwarded a copy to each of the U.S. Attorneys in the pilot districts now under the arbitration rules.

Attachment

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U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 21, 1985

MEMORANDUM FOR ALL ASSISTANT ATTORNEYS GENERAL AND
ALL UNITED STATES ATTORNEYS

FROM: D. Lowell Jensen
Deputy Attorney General

SUBJECT: Department Policy With Respect to Local Court Rules Requiring Manadatory Arbitration

In recent years, a number of district courts have adopted or broadened the scope of their local rules of court providing for mandatory arbitration of certain types of civil cases pending in the district. The Department of Justice supports efforts in numerous contexts to explore means of alternative dispute resolution in order to reduce the number of cases that must endure the expense of trial in the courts, and we have endorsed a limited pilot program of mandatory arbitration in several districts since 1978. However, the recent effort by additional district courts to adopt local rules for mandatory arbitration of cases has raised several questions with respect to the participation by the United States in arbitration under the various plans. These plans vary widely with respect to the types of cases that are sent to arbitration and to the treatment of cases in the arbitration process.

The attached directive sets forth the policy of the Department of Justice with respect to participation in any local program of mandatory arbitration pursuant to court order. Under this policy, the Department anticipates that many cases involving only money damages of a limited amount (such as $100,000) can be litigated under the experimental arbitration programs of the various districts. However, in view of the existing regulations of the Department with respect to settlement of cases, the attorney for the government in each case is instructed to take appropriate measures to preserve the interests of the United States and to ensure that a case is not settled in a manner inconsistent with the delegation of settlement authority under the Department's regulations. The Department particularly opposes the imposition of penalties or sanctions against the United States for failure to acquiesce in any arbitration award.

The attached directive will be published as an appendix to the Department's regulations on settlement authority, 28 C.F.R. Part 0, Subpart Y. Please ensure that this directive is brought to the attention of the attorneys under your direction who are assigned to a case that is ordered to mandatory arbitration under a local court rule.

DIRECTIVE

Participation by the United States in Court-Annexed Arbitration

(a) Considerations Affecting Participation in Arbitration.

(1) The Department recognizes and supports the general goals of court-annexed arbitration, which are to reduce the time and expenses required to dispose of civil litigation. Experimentation with such procedures in appropriate cases can offer both the courts and litigants an opportunity to determine the effectiveness of arbitration as an alternative to traditional civil litigation.

(2) An arbitration system, however, is best suited for the resolution of relatively simple factual issues, not for trying cases that may involve complex issues of liability or other unsettled legal questions. To expand an arbitration system beyond the types of cases for which it is best suited and most competent would risk not only a decrease in the quality of justice available to the parties but unnecessarily higher costs as well.

(3) In particular, litigation involving the United States raises special concerns with respect to court-annexed arbitration programs. A mandatory arbitration program potentially implicates the principles of separation of powers, sovereign immunity, and the Attorney General's control over the process of settling litigation.

(b) General Rule Consenting to Arbitration Consistent With the Department's Regulations

(1) Subject to the considerations set forth in the following paragraphs and the restrictions set forth in paragraphs (c) and (d), in a case assigned to arbitration or mediation under a local district court rule, the Department of Justice agrees to participate in the arbitration process under the local rule. The attorney for the government responsible for the case should take any appropriate steps in conducting the case to protect the interests of the United States.

(2) Based upon its experience under arbitration programs to date, and the purposes and limitations of court-annexed arbitration, the Department generally endorses inclusion in a district's court-annexed arbitration program of civil actions --

(A) in which the United States or a Department, agency, or official of the United States is a party, and which seek only money damages in an amount not in excess of $100,000, exclusive of interest and costs; and

(B) which are brought (i) under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, or (ii) under the Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. 905, or (iii) under the Miller Act, 40 U.S.C. 270(b).

(3) In any other case in which settlement authority has been delegated to the United States Attorney under the regulations of the Department and the directives of the applicable litigation division and none of the exceptions to such delegation apply, the United States Attorney for the district, if he concludes that a settlement of the case upon the terms of the arbitration award would be appropriate, may proceed to settle the case accordingly.

(4) Cases other than those described in paragraph (2) that are not within the delegated settlement authority of the United States Attorney for the district ordinarily are not appropriate for an arbitration process because the Department generally will not be able to act favorably or negatively in a short period of time upon a settlement of the case in accordance with the arbitration award. Therefore, this will result in a demand for trial de novo in a substantial proportion of such cases to preserve the interests of the United States.

(5) The Department recommends that any district court's arbitration rule include a provision exempting any case from arbitration, sua sponte or on motion of a party, in which the objectives of arbitration would not appear to be realized, because the case involves complex or novel legal issues, or because legal issues predominate over factual issues, or for other good cause.

(c) Objection to the Imposition of Penalties or Sanctions Against the United States for Demanding Trial De Novo

(1) Under the principle of sovereign immunity, the United States cannot be held liable for costs or sanctions in litigation in the absence of a statutory provision waiving its immunity. In view of the statutory limitations on the costs payable by the United States (28 U.S.C. 2412(a) & (b) and 1920), the Department does not consent to provisions in any district's arbitration program providing for the United States or the Department, agency, or official named as a party to the action to pay any sanction for demanding a trial de novo -- either as a deposit in advance or as a penalty imposed after the fact -- which is based on the arbitrators' fees, the opposing party's attorneys' fees, or any other costs not authorized by statute to be awarded against the United States. This objection applies whether the penalty or sanction is required to be paid to the opposing party, to the clerk of the court, or to the Treasury of the United States.

(2) In any case involving the United States that is designated for arbitration under a program pursuant to which such a penalty or sanction might be imposed against the United States, its officers or agents, the attorney for the government is

instructed to take appropriate steps, by motion, notice of objection, or otherwise, to apprise the court of the objection of the United States to the imposition of such a penalty or sanction.

(3) Should such a penalty or sanction actually be required of or imposed on the United States, its officers or agents, the attorney for the government is instructed to --

(A) advise the appropriate Assistant Attorney General of this development promptly in writing;

(B) seek appropriate relief from the district court; and

(C) if necessary, seek authority for filing an appeal or petition for mandamus.

The Solicitor General, the Assistant Attorneys General, and the United States Attorneys are instructed to take all appropriate steps to resist the imposition of such penalties or sanctions against the United States.

(d) Additional Restrictions

(1) The Assistant Attorneys General, the United States Attorneys, and their delegates, have no authority to settle or compromise the interests of the United States in a case pursuant to an arbitration process in any respect that is inconsistent with the limitations upon the delegation of settlement authority under the Department's regulations and the directives of the litigation divisions. See 28 C.F.R. Part 0, Subpart Y and Appendix to Subpart Y. The attorney for the government shall demand trial de novo in any case in which --

(A) settlement of the case on the basis of the amount awarded would not be in the best interests of the United States;

(B) approval of a proposed settlement under the Department's regulations in accordance with the arbitration award cannot be obtained within the period allowed by the local rule for rejection of the award; or

(C) the client agency opposes settlement of the case upon the terms of the settlement award, unless the appropriate official of the Department approves a settlement of the case in accordance with the delegation of settlement authority under the Department's regulations.

(2) Cases sounding in tort and arising under the Constitution of the United States or under a common law theory filed against an employee of the United States in his personal capacity for actions within the scope of his employment which are

alleged to have caused injury or loss of property or personal injury or death are not appropriate for arbitration.

(3) Cases for injunctive or declaratory relief are not appropriate for arbitration.

(4) The Department reserves the right to seek any appropriate relief to which its client is entitled, including injunctive relief or a ruling on motions for judgment on the pleadings, for summary judgment, or for qualified immunity, or on issues of discovery, before proceeding with the arbitration process.

(5) In view of the provisions of the Federal Rules of Evidence with respect to settlement negotiations, the Department objects to the introduction of the arbitration process or the arbitration award in evidence in any proceeding in which the award has been rejected and the case is tried de novo.

(6) The Department's consent for participation in an arbitration program is not a waiver of sovereign immunity or other defenses of the United States except as expressly stated; nor is it intended to affect jurisdictional limitations (*e.g.*, the Tucker Act).

(e) Notification of New or Revised Arbitration Rules

The United States Attorney in a district which is considering the adoption of or has adopted a program of court-annexed arbitration including cases involving the United States shall --

(1) advise the district court of the provisions of this section and the limitations on the delegation of settlement authority to the United States Attorney pursuant to the Department's regulations and the directives of the litigation divisions; and

(2) forward to the Executive Office for United States Attorneys a notice that such a program is under consideration or has been adopted, or is being revised, together with a copy of the rules or proposed rules, if available, and a recommendation as to whether United States participation in the program as proposed, adopted, or revised, would be advisable, in whole or in part.

THE SECRETARY OF THE NAVY
WASHINGTON, D. C. 20350

23 December 1986

MEMORANDUM FOR THE CHIEF OF NAVAL OPERATIONS
THE COMMANDANT OF THE MARINE CORPS
THE ASSISTANT SECRETARY OF THE NAVY (RE&S)
THE ASSISTANT SECRETARY OF THE NAVY (FM)
THE ASSISTANT SECRETARY OF THE NAVY (S&L)
THE ASSISTANT SECRETARY OF THE NAVY (M&RA)
THE GENERAL COUNSEL OF THE NAVY

Subject: The Department of the Navy Alternative Disputes Resolution Program

The Navy has experienced an explosion in many areas of its litigation over the past five years, including a 100% increase in contract disputes before the Armed Services Board of Contract Appeals (ASBCA). We must explore alternative methods of resolving cases in litigation which both efficiently use scarce resources and adequately protect the Navy's interests. At the same time, every reasonable step must be taken to resolve disputes prior to litigation.

Attached are procedures for an Alternative Disputes Resolution (ADR) Program. It describes several ADR techniques including the mini-trial, an abbreviated trial-like procedure before business officials of the Navy and the contractor. I believe that techniques such as these bear great promise in contract disputes resolution and should be tested throughout the Navy acquisition community. While they are oriented to litigation, they may also be helpful in resolving pre-litigation disputes.

Accordingly, for the next year, and under the guidance and control of the General Counsel, this program will be implemented as a test by all Navy activities who contract with the private sector. Each contract dispute now pending and those filed during this test period will be reviewed and ADR techniques used if reasonable. At the conclusion of the test, the General Counsel will assess and report on the test results.

Finally, all Navy activities must ensure that appropriate management review is being made of proposed contracting officer's final decisions and that appropriate steps are being taken to resolve contract disputes before such decisions are issued. When reasonable management efforts are unsuccessful in achieving a resolution of a dispute, we will engage in litigation.

John Lehman

Atts.

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Text

PROCEDURES TO BE USED IN NAVY'S TEST PROGRAM USING ALTERNATIVE DISPUTES RESOLUTION

Subject: The Department of the Navy Alternative Disputes Resolution Program

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DEPARTMENT OF THE NAVY ALTERNATIVE DISPUTES RESOLUTION PROCEDURES

I. *PURPOSE.* This document contains guidance for the use of Alternative Disputes Resolution techniques (ADR) for the resolution of contract disputes before the Armed Services Board of Contract Appeals (ASBCA).

II. *APPLICABILITY.* These procedures apply to all Department of the Navy components processing contract appeals before the ASBCA.

III. *POLICY.* It is the policy of the Department of the Navy to utilize ADR in every appropriate case. The approval of the General Counsel of the Navy or his designee must be obtained before the Navy agrees to utilize ADR with regard to any particular case.

IV. *DISCUSSION.*

A. *In General.* ADR techniques (for instance, mini-trials) facilitate resolution of disputes faster and cheaper than is possible with litigation. They provide a framework within which sufficient information can be presented to enable the parties to make reasoned judgments regarding resolution of a dispute. These techniques may be adapted to the peculiar requirements of a particular case or cases. Their use is voluntary, and, if unsuccessful, the underlying litigation can be resumed. Not every ADR effort will be successful. However, when used judiciously both in the private sector and in several Government agencies, a variety of disputes have been efficiently resolved.

B. *Case Selection.*

1. *Generally.* An important initial determination is whether the information likely to be developed using ADR will be sufficient for the parties to reevalute their positions and to resolve the dispute. The decision to proceed with ADR is a business decision, which must take into account relevant legal considerations. The fact that resolution of a dispute involves legal issues such as contract interpretation does not necessarily eliminate that case from consideration. Similarly, the amount in dispute is a relevant factor to use but should not soley control the decision.

2. *Types of Cases.* The best candidates for ADR treatment are those cases in which only facts are in dispute, while the most difficult are those in which disputed law is applied to uncontroverted facts. Two types of cases have generally proven to be poor candidates: those involving disputes controlled by clear legal precedent, making compromise difficult, and those whose resolution will have a significant impact on other pending cases or on the future conduct of the Navy's business. In these cases, the value of an authoritative decision on the merits will usually outweight the short-term benefits of a speedy resolution by ADR.

3. *Responsibilities.* The responsibility for identifying candidate cases lies not only with the assinged Navy tgrial counsel as part of the periodic review of the status of on-going litigation, but also with the cognizant officials of the Navy activity from which contract disputes originate. Once these officials and the contractor are in accord regarding use of ADR in a given case, the recommendation to proceed should

be forwarded to the General Counsel of the Navy or his designee for approval.

C. Examples of ADR Techniques.

1. *The Mini-Trial.* The mini-trial brings together an official from each contracting party with authority to resolve the dispute (the "principals") to hear evidentiary presentations from a representative of each party (usually, the trial counsel) and thereafter to discuss resolution of the dispute. While the mini-trial will be tailored to the particular requirements of a given case, each mini-trial will be governed by a written agreement between the parties, an example of which is attached as Attachment 1.

(a) *The mini-trial stages.* The mini-trial has three distinct stages, all of which can usually be completed within 90 days.

(i). *The pre-hearing stage.* This stage covers the time between agreement on written mini-trial procedures and commencement of the mini-trial hearing. During this stage, the parties will complete whatever preparatory activities (such as discovery and exchange of position papers) are permitted by the agreement. This stage will consume the bulk of the time to complete the mini-trial.

(ii). *The hearing stage.* In this stage, the representatives will present their respective positions to the principals. Each representative will be given a specific amount of time within which to make this presentation, and how that time is utilized is solely at the discretion of the representative. Mini-trial agreements also can provide for rebuttal presentations and for a question and answer period for the principals. In most cases, this stage should take 1-3 days.

(iii). *Post-hearing discussions stage.* In this stage, the principals will meet to discuss resolution of the dispute. The mini-trial agreement should establish a time limit within which the principals either agree to resolve the dispute or agree that the underlying litigation should be resumed.

(b). *The neutral advisor.* A mini-trial agreement may provide for the services of a neutral advisor, who is an impartial third party experienced in government contract law and, preferably, in litigation as well. There is no requirement to have such an advisor, and, in fact, in the smaller, less complex cases, the need for a neutral advisor will be the exception. The neutral advisor shall provide such services as are delineated in the mini-trial agreement and in the specific agreement between the neutral advisor and the parties.

The best source of neutral advisors in the ASBCA. During the negotiation of a mini-trial agreement, if the use of a neutral advisor is contemplated, the parties should attempt to agree on a list of ASBCA judges who would be mutually acceptable. Thereafter, the General Counsel or his designee will submit that list and the agreed-upon schedule for the mini-trial to the Chairman of the ASBCA along with a request that one of the listed judges be detailed to serve as the neutral advisor in the mini-trial proceedings.

If this effort is unsuccessful, then the Navy could agree to seek a neutral advisor from the private sector. Such an advisor, in addition to the qualifications and limitations noted above, and in the absence of special circumstances, shall not be anyone who is presently representing the contractor in a dispute against the Navy (such as an attorney in private practice). Sources of private sector neutral advisors include retired Trial Commissioners of the U.S. Court of Claims, retired Judges of the U.S. Claims Court and present or retired members of law school faculties.

(c). *Other participants.* In general, the only participants in the mini-trial will be the principals, their representatives, the neutral advisor (if any) and any witnesses to be called by either party at the hearing. In a case where there are substantial legal issues, the mini-trial agreement should permit the presence and participation of in-house non-litigation counsel for each of the principals.

(d). *Other factors.* Several other factors should be considered during the negotiation of a mini-trial agreement;

(i). Neither mini-trial principal should have had responsibility either for preparing the claim (in the case of the contractor) or for denying that claim (in the case of the Navy).

(ii). The Navy's principal must have contracting officer authority sufficient for the amount in dispute.

(iii). The agreement shall provide that the post-hearing discussions shall not be used by either party in subsequent litigation as an admission of liability or as an indication of willingness to agree on any aspects of settlement.

(iv). Because a legal memorandum must be prepared to support any resolution resulting from a mini-trial, the Navy principal must have the right to consult with nonlitigation in-house counsel prior to a final agreement on resolution of a dispute.

2. *Other techniques.*

(a). *Generally.* While the mini-trial will be the basic technique most commonly used in resolving contract disputes outside the traditional litigation context, its description in the preceding section does not necessarily limit other approaches. Further, while it is the linchpin of a structured settlement process, imaginative adjustments to the litigation process at the ASBCA could also be a valuable tool for the parties to resolve disputes at a substantial savings of time and dollars.

(b). *Summary binding ASBCA procedure.* It may not be economical for a Navy activity involved in a large number of small dollar contract claims to focus any formal ADR technique on the resolution of a single such dispute. However, such may not be the case if a number of those disputes could be handled either together or sequentially in a brief period of time. One way this could occur is to employ a summary procedure before the ASBCA. Such a procedure could have the following characteristics:

(i). The parties would agree to submit a joint motion to the ASBCA to permit the case to be processed under summary procedures.

(ii). One element of this procedure is a hearing at which the parties would be given a limited amount of time (for instance, one hour) to make a presentation to the ASBCA judge, and, for instance, half that time to rebut the other party's presentation. How that presentation would be structured would be at the sole discretion of each party's representative.

(iii). At the conclusion of these presentations, the judge would decide the case from the bench. The only document would be a binding order stating the judge's decision on the ultimate question whether the appeal is sustained or denied, and, if sustained, the amount awarded, if any.

(iv). The parties would agree to waive their respective rights to appeal under the Contract Disputes Act of 1978.

(v). An additional element of this procedure could be to limit the persons making the presentations to non-lawyers (for instance, the Navy contracting officer and his counterpart in the contractor's organization).

Under this suggested procedure, it would take half a day to decide one case, and if scheduled sequentially, several cases could be resolved in just a few days.

(c). *Summary non-binding ASBCA procedure.* A variation of the suggestion in (b) above is to substitute an advisory opinion from the ASBCA for the binding bench decision. In this situation, the judge might function much as a non-binding arbitrator, whose an advisory opinion might enhance resolution of the dispute.

(d). *Other considerations.*

(i). While the procedure in (c) above may not provide the likelihood of sufficient savings in resources when applied to a single case, a series of cases could be scheduled, some under (b) above and others under (c).

(ii). In the event several cases are scheduled for seriatim disposition under summary procedures, the General Counsel or his designee will submit to the Chairman of the ASBCA the motions noted in IV.C.2(b)(i) above and a request for the assignment of a judge or judges depending on the length of the schedule.

ATTACHMENT 1

AGREEMENT CONCERNING PROCEDURES FOR MINI-TRIAL IN ASBCA No. XXXXX

1. XYZ Corporation ("XYZ") and the Department of the Navy (the "Navy"), agree to exchange facts and legal positions and to engage in discussions relating to ASBCA No. XXXXX in accordance with the procedures set forth herein.

2. XYZ and the Navy agree that the purpose of these procedures is to facilitate resolution of the claim(s) at issue in ASBCA No. XXXXX without resort to further litigation.

3. The parties shall exchange their positions on the legal and factual issues involved, and the contractor shall provide all necessary financial documentation of each element of quantum, except to the extent the parties agree on the amounts of any or all of such elements.

4. XYZ and the Navy agree that trial counsel (the "representative") for each party shall make an oral presentation of such party's position with respect to the ASBCA No. XXXXX in a proceeding before a panel (the "mini-trial hearing"). The panel shall consist of a management official of each party (a "principal participant") with a neutral third party presiding (the "neutral advisor"). XYZ and the Navy further agree (a) that the mini-trial hearing will be preceded by a prehearing period, which may include the discovery as set forth in Paragraph 15 hereof, and the exchange of exhibits (including documents), position papers and responses, and (b) that the mini-trial hearing will be followed by discussions. The parties will follow the schedule set forth in Exhibit A.

Principal Participants

5. ________ of XYZ and ________ of the Navy shall attend the mini-trial hearing and the settlement discussions as the principal participants. They shall review the respective positions on the facts and the law, including quantum, together with the supporting documentation. After the mini-trial hearing, they will enter into good faith discussions to resolve ASBCA No. XXXXX.

6. The principal participants shall have authority to settle the ASBCA No. XXXXX. The principal participants may consult with others during their discussions and before making a final commitment to a negotiated settlement.

7. The principal participants may ask any questions of the representatives and any other persons participating in the presentations to clarify their understanding of the matters being presented by them during the mini-trial hearing.

8. Each principal participant may be accompanied and advised by one in-house non-litigation counsel.

Neutral Advisor

9. XYZ and the Navy jointly designate ________ as the neutral advisor.

10. The neutral advisor shall preside or serve as moderator at the mini-trial hearing. The neutral advisor may ask questions to seek clarification, but may not direct, limit or otherwise interfere with either representative's presentation or rebuttal, surrebuttal, or closing argument.

11. By agreement, the representatives may jointly seek the advice and assistance of the neutral advisor regarding any question or disagreement concerning these procedures or the Schedule. The representatives may also jointly discuss with the neutral advisor any administrative matters necessary to arrange or to facilitate the procedures set forth herein.

12. Unless the representatives mutually agree, there shall be no separate communication by either party with the neutral advisor on any matter relating to this Agreement at any time prior to final resolution of ASBCA No. XXXXX.

13. The neutral advisor shall not participate in any capacity for either party with respect to ASBCA No. XXXXX if the procedures set forth herein do not result in a final resolution, and neither party shall attempt to obtain any disclosure or discovery from the neutral advisor in respect to the subject matter of ASBCA No. XXXXX or these proceedings.

14. The written agreement between the neutral advisor and the parties shall include agreements (a) that all information (including testimony) and documents received as a result of participating in this minitrial shall not be disclosed to any third party; (b) that all documents submitted, including copies of such documents, shall be returned to the submitting party and all notes prepared shall be destroyed within 10 days after this Agreement terminates; and (c) that the neutral advisor will abide by and comply with this Agreement.

Prehearing procedures

15. All prehearing procedures shall be completed according to the Schedule attached hereto.

16. XYZ and the Navy agree to respond to any discovery requests from the other party (including written interrogatories, production of documents, and admissions). The scope of discovery shall be governed by rule 26(b) of the Federal Rules of Civil Procedure.

17. Discovery undertaken pursuant to this Agreement shall not affect in any manner either party's access to information or right to discovery in ASBCA No. XXXXX (including, but not limited to, its right to depose any person concerning any matter) in the event that these procedures do not result in a final agreement.

18. XYZ and the Navy further agree that the following procedures shall apply to discovery undertaken pursuant to this Agreement.

(i) Either party may elect not to produce any information or document which it deems protected from disclosure by the attorney-client privilege, the work-product immunity, any governmental privilege, or any common law, statute, or regulation. As a general rule, this election will be made only under the most compelling circumstances.

(ii) In the event either party determines to produce any information or document it deems protected for any reason set forth in subparagraph (i) above, it shall designate such information or document as "privileged". The requesting party agrees that production of such information or document shall not be deemed or constitute a waiver of any applicable protection against disclosure of such information or document for any purpose, except for the limited purpose of this Agreement. The requesting party further agrees that it shall treat any information or document designated as "privileged" in accordance with subparagraphs (iii) and (iv) below.

(iii) XYZ and the Navy agree to limit disclosure of any information or document, received by them respectively and designated as "privileged" by the other, to the persons necessary to assist the representatives or the principal participants, or both. No privileged document will be made part of or included in any file.

(iv) Any person receiving any information or document designated as "privileged" including, but not limited to, copies of documents or notes relating thereto, shall return such document within 10 days after this Agreement terminates.

19. The representatives shall exchange with each other, the principal participants, and the neutral advisor on the dates indicated in the Schedule (a) a position paper which shall not exceed ___ letter size, double-spaced pages in length, including all appendices and attachments, and (b) a response to the position paper of the other party which shall not exceed ___ letter size, doublespaced pages in length, including all appendices and attachments.

20. The representatives shall exchange with each other, the principal participants and the neutral advisor a list of persons who will be present at and participate in their respective presentations.

The Mini-trial Hearing

21. Each representative shall present his position to the principal participants and the neutral advisor on the dates and within the time limits set forth in the Schedule. Each representative may reserve for additional rebuttal any time in the Schedule set aside but not utilized for his initial presentation.

22. The representatives shall have complete discretion to structure their respective presentations and rebuttals which may include, but shall not be limited to, testimony by nonlawyers, audio visual aids, demonstrative evidence, and oral argument. The rules of evidence shall not apply. Neither representative may call persons employed by or otherwise in the control of the other party. The representatives may use deposition testimony of any such person in connection with his presentation.

23. No transcription, recording or other record shall be made of the presentation proceeding. The representatives, in-house counsel, the neutral advisor and the principal participants may make notes during the mini-trial hearing with the understanding that such notes shall be destroyed within 10 days after this Agreement terminates.

24. During the times set aside for their respective rebuttals, each representative may ask questions of the other and of any person who participated in the other party's presentation who shall remain available until excused. During the time set aside for questions and answers, the principal participants may ask questions of any person who participated in the presentations. Any time remaining after the principal participants' questions shall be divided equally between each representative for any further questions and answers.

Post-Hearing Procedures

25. After the mini-trial hearing, the principal participants and their in-house counsel shall meet at the times set forth in the Schedule to discuss their respective positions and the possible resolution of all matters relating to ASBCA No. XXXXX.

26. As part of their discussions, the principal participants at their discretion may request the neutral advisor to provide his views concerning the relative merits of the parties' positions.

Future Use and Confidentiality of Statements and Documents

27. XYZ and the Navy agree that all offers, promises, conduct and statements, whether oral or written,

made in connection with this Agreement or pursuant to the procedures set forth herein are part of a compromise negotiation, are confidential, shall not be admissible as evidence, and may not be used for any other purpose, including impeachment, in any other proceeding. XYZ and the Navy further agree that all documents and copies thereof submitted to each of them shall be returned to the submitting party, and all notes relating to the mini-trial proceedings shall be destroyed within 10 days after termination of this Agreement.

28. All documents, including, but not limited to, all position papers, responses, and writings of the neutral advisor and the principal participants, prepared in the course of the procedures set forth herein shall be inadmissible as evidence and may not be used for any other purpose, including impeachment, in any other proceeding.

29. Except for the documents described in Paragraph 28 hereof, any document presented by either party pursuant to these procedures to which there is otherwise any right to access or which otherwise may be discovered pursuant to the Federal Rules of Civil Procedure and admitted in evidence pursuant to the Federal Rules of Evidence may be accessed, discovered or admitted in evidence in any other proceeding.

Termination of Agreement

30. XYZ and the Navy agree that this Agreement shall terminate if-

(a) the parties reach a final agreement resolving all matters relating to ASBCA No. XXXXX;

(b) the parties fail to reach a final agreement resolving all matters relating to ASBCA No. XXXXX by (give date);

(c) either party notifies the other party in writing at any time that it desires to terminate the Agreement;

31. Notwithstanding Paragraph 30 hereof, Paragraphs 12-14, 18, and 27-29 shall remain in full force and effect.

Counsel for XYZ Corporation
Counsel for the Department of the Navy

Date:______
Date:______

EXHIBIT A
MINI-TRIAL SCHEDULE

Day 1	Discovery requests served	
6	Representatives discuss discovery schedule, objections, and confidentiality requirements	
30	Complete discovery	
40	Exchange any proposed stipulations	
54	Meet to agree to fact and quantum stipulations	
59	Exchange position papers, witness lists, and exhibits	
73	Exchange rebuttal papers and rebuttal exhibits	
78	Meet with neutral advisor to resolve any procedural issues	
83	Mini-trial hearing Location:______________	
		8:30-9:00 Principals, representatives, and neutral advisor meet to review ground rules
		9:00-10:30 Contractor presentation
		10:30-10:45 Break
		10:45-11:45 Contractor presentation (cont'd)
		11:45-1:00 Lunch
		1:00-2:30 Navy presentation
		2:30-2:45 Break
		2:45-3:45 Navy presentation (cont'd)
Day 84		9:00-10:15 Contractor rebuttal
		10:30-12:15 Navy rebuttal and closing argument
		12:30-1:00 Closing surrebuttal and closing argument
		1:00-2:00 Lunch
		2:00-3:45 Open Q&A session
		3:45-???? Discussion between principals
85		8:00-???? Further discussions between principals, if needed

Veterans
Administration

[illegible]

From: Assistant General Counsel (025)

Subj: Instructions for Settlement of Contract Disputes After the Filing of an Appeal with the VABCA -- Role of Trial Attorneys

To: VACO and District Counsel Attorneys Serving as Government Trial Counsel in VABCA or VACAB Matters

1. This memorandum was prepared to set out the General Counsel office policy on settlements of contract disputes cases after an appeal has been filed with the VABCA, and the role of Trial Attorneys in such settlements. The Government is not precluded from seeking a negotiated agreement to dispose of a contract dispute after an appeal has been filed. However, whether employed in Central Office or in a District Counsel's office, the Trial Attorney seeking such an agreement does not have the independent authority to settle a case, even though he/she has a prominent role in settlement negotiations and should be instrumental in providing legal advice and recommendations to contracting personnel who have the actual settlement authority. A Trial Attorney's assistance and advice is particularly appropriate in connection with settlements, because his/her trial preparations must, of necessity, have resulted in a thorough review of the claim and its evidentiary bases. The Trial Attorney should undertake such a settlement-related role when in his or her judgment a settlement can be justified on the basis of the facts and the law, and in accordance with the provisions of the contract involved.

2. Before any settlement is finally agreed to by the Trial Attorney, he/she must be assured that the Contracting Officer is willing to accept the settlement terms. The foundation for such acceptance can usually best be accomplished by a thorough discussion of the facts and law with the Contracting Officer (and the Chief of Supply/Purchasing and the VAMC Director, as necessary). This discussion should be followed by a presentation and discussion of the Trial Attorney's recommendation(s) for resolving the instant dispute.

3. In all appeal cases where the matter of possible settlement is presented before commencement of a trial and, in the opinion of the Trial Attorney, settlement may be in the best interests of the Government, the Trial Attorney will prepare a settlement memorandum. This memorandum will set forth the facts, based upon information available at the time, and a legal evaluation by the Trial Attorney indicating the maximum settlement figure which could be supported considering the fair litigative value of the case. The settlement memorandum must be submitted,

through the District Counsel (where appropriate) and the Deputy Assistant General Counsel (025B), to the Assistant General Counsel (025) for approval. This should be done not later than five (5) working days prior to the date of trial.

4. After direct interviews with VA witnesses in cases where the Trial Attorney is in the field to commence trial of a case, the facts in a particular case may turn out to be different from those originally asserted. Any prior conclusions as to the outcome of the case which have been reached may have to be changed. If such is the situation and the value of the proposed settlement exceeds $10,000, the Trial Attorney will communicate such new/changed facts and her/his views thereon to the Deputy Assistant General Counsel (025B), who shall obtain the concurrence of the Assistant General Counsel (025), before concluding a settlement in excess of the amount specified in the previously prepared settlement memorandum. (Where appropriate, District Counsel attorneys shall make this communication through their respective District Counsel.) In the absence of such (025) concurrence in the proposed settlement, the Trial Attorney shall either proceed to trial or seek a delay from the VABCA or VACAB hearing member, through joint efforts with Appellant and Appellant's counsel, in order to make a further attempt at an amicable settlement. Upon return to his/her office after a settlement has tentatively been reached, whether or not a trial was held, the Trial Attorney shall prepare a settlement memorandum in the form prescribed in paragraph 3, above, for consideration and approval.

5. In appeal cases where the proposed settlement exceeds $10,000 and where the matter of possible settlement is actively presented for the first time at the commencement of or during a hearing, and in the opinion of the Trial Attorney settlement may be in the best interests of the Government, the Trial Attorney shall make an attempt at an amicable settlement. When the proposed settlement exceeds $10,000 the Trial Attorney shall contact (through his/her District Counsel, as appropriate) the Deputy Assistant General Counsel (025B) or, if the Deputy is not available, the Assistant General Counsel (025) and shall communicate all the facts which the Trial Attorney believes justify a settlement, and request oral guidance on and concurrence in the proposed settlement. Upon return to his/her office, the Trial Attorney shall prepare a settlement memorandum as prescribed in paragraph 3, above, for consideration and approval.

6. Central Office Trial Attorneys have the authority to recommend settlements of less than $10,000 to procurement officials without first obtaining the concurrence of their supervisors. Such recommendations shall be memorialized in a settlement memorandum, as outlined in paragraph 3, above, when a settlement is reached.

7. Field station Trial Attorneys must submit all settlement recommendations to VACO for approval, regardless of the amount, in accordance with the guidance outlined in the paragraphs above.

8. Settlement of any case shall be implemented by a formal Settlement Stipulation which requests the Board to dismiss the appeal with prejudice. Such Stipulations shall be signed by the Contracting Officer, the Appellant, and Counsel for both parties.

9. In cases where the dispute is not before the VABCA or VACAB, proposed final decisions or settlement agreements by Contracting Officers in certain situations are still subject to the requirement for legal review in the office, pursuant to VAAR 801.602-70(b). While Trial/Staff Attorneys may advise Contracting Officers on proposed settlements, no Trial/Staff Attorney is authorized on his/her own to approve settlement agreements in such pre-dispute cases. The legal review of such proposed settlement agreements must be signed off on by the Assistant General Counsel (025).

10. Samples of a Settlement Memorandum and of a Settlement Stipulation are attached. If you have any questions please call or see either Gary Krump (025B) (FTS 389-3994/3997) or me (FTS 389-2217/5110).

WILLIAM E. THOMAS, JR.

Attachments

SETTLEMENT MEMORANDUM

SUBJ:

1. Statement of Facts:

This Appeal is from a final decision of the Contracting Officer terminating the subject contract for default. The Contracting Officer received four (4) bids upon an invitation to furnish the necessary labor, materials and equipment required to remove an existing overhead door system and to enlarge the entrance opening as specified. Bids were opened on June 25, 1982. bid of $18,950.00 was low. The next two low bids were at $19,091.00 and $19,431.00. The fourth bid was at $49,800.00.

Because the three lowest bids were tightly grouped, the low bidder was not asked to verify its bid. The contract was awarded to on June 29, 1982. Neither performance nor payment bonds were required under this contract. The contract called for completion within 90 days of Appellant's receipt of notice to proceed. NTP was acknowledged on August 5, 1982, thus requiring completion by November 3, 1982.

On August 10, 1982, Appellant furnished to the VA a complete cost breakdown of its total price. In this breakdown, only $1,300.00 was allocated to electrical work. There was no separate price included for relocation of telephone cables. The contract required, among other things, that all utility relocations be accomplished ... "at the contractor's expense". After almost two months without performance, Appellant's letter of October 5, 1982, informed the Supply Service that these telephone line relocation costs had not been included in its bid. The Appellant requested that its bid be reconsidered, citing on additional cost of approximately $13,000.00 being demanded by the two involved utilities and

The Appellant would not begin construction until the resposiblility for contracting for utility relocation was resolved. The available evidence establishes that was quoting the Apellant a price at least double that being quoted to the VA for the same work. When the Appellant requested an extension of time in which to resolve the matter, the Contracting Officer asked the advice of the Chief of the Engineering Service, who recommended a termination for default. On January 25, 1983, the contract was terminated for default.

Since the date of the appeal from that termination, it has been established that neither the second nor third bidders (at $19,091.00 and $19,431.00) had included the cost of utility (telephone) relocation in their bids. A reprocurement contract has since been awarded at a price of $39,163.00.

2. Legal Analysis and Recommendations:

The undersigned has discussed the above-recited matters with the Contracting Officer alone and, later, with the Chief of the Engineering Service present. At both times, the Contracting Officer stated that he would have preferred to terminate the contract for convenience. The Chief of Engineering also now feels that this would have been the better course of action. They both recognize that the telephone utility was quoting lower prices to the VA than to the contractor, for basically the same work, and admit that the Appellant was probably justified in refusing to deal directly with , considering the situation.

The Government would have several hurdles to overcome in defending this default termination. The first problem is that the decision to terminate was not the *personal* decision of the Contracting Officer. He, in effect, allowed the Chief of the Engineering Service to make that judgment. The VA Board of Contract Appeals has repeatedly stated that such decisions *must* be a result of the personal and independent judgment of the Contracting Officer: *See*, *e.g.*, the appeal of *Edmund Leising Building Contractor, Inc.*, VACAB-1428, 81-1 BCA, at pg. 73,852; The appeal of *Byrd Foods, Inc.*, VABCA-1679, 83-1 BCA___________.

The second problem involves the Appellant's allegation, after award, of a mistake-in-bid. Although the contract provisions are fairly clear that utility relocation is the contractors's responsibility, the fact that two other bidders are willing to testify that they too failed to include such costs in their bids, lends credence to Appellant's claim that such costs were omitted from its bid. Further evidence that these costs were not included is contained in the August 10, 1982 breakdown furnished by the Appellant. The fact that this breakdown was submitted only five days after receipt of notice to proceed, and before any mistake was alleged, adds credibility to the document. A mistake in contract *interpretation* (as opposed to *judgment*), even when unilateral, provides a basis for relief from the obligation to perform the disputed work without compensation:

Aydin Corporation v. The United States, 669 F.2d 681,685 (Ct. of Claims - 1982). See also, 41 CFR, Section 1-2.406-4(b) and (c), allowing rescission where (as here) all three low bids would have alerted the Contracting Officer to a mistake, had he been so informed prior to award of the contract.

In this situation, had the Contracting Officer exercised his personal judgment, he now agrees that he would have rescinded the contract. Because the three lowest bids were so closely grouped, reformation would have been out of the question.

The Appellant's attorneys agree that a contract rescission, rather than a convenience termination, would have been the proper procedure. They will agree to the conversion of the default action to one of recission, with no costs or damages recoverable by either the Appellant or the VA. The Contracting Officer also agrees to the no-cost conversion to a rescission.

For all of the above-stated reasons, the undersigned believes that it would be in the best interests of the Government to convert the default termination to one of contract rescission, at no cost to either party.

Government Trial Attorney (025B)

Concur For
Negotiation Purposes:

	(025B)	DATE
	(025)	DATE

BEFORE THE
VETERANS ADMINISTRATION BOARD OF CONTRACT APPEALS

In the matter of the appeal of	)	
	)	
	)	
	)	
Contract No.	)	VABCA-
	)	
VA Medical Center	)	
	)	

GOVERNMENT'S STIPULATION

WHEREAS, both Appellant and Respondent recognize that further litigation of the subject appeal would be in the best interests of neither party,

WHEREAS, both parties desire to avoid further expense involved in litigation of this appeal,

THEREFORE, it is hereby agreed and stipulated as follows:

1. The Veterans Administration agrees to pay to the Appellant the sum of $2,500.00 in full settlement of all claims which are the subject of this appeal and which arise from the performance of Contract No. at VAMC,

2. The Appellant agrees to accept the sum of $2,500.00 in ull satisfaction of any and all claims against the Government hich are the subject of this appeal and which arise from the erformance of Contract No.   , at VAMC,

3. By signing this stipulation, the Appellant hereby withraws the above-referenced appeal with prejudice.

______________________________ ______________ DATE
overnment Trial Attorney

______________________________ ______________ DATE
ontracting Officer

y ______________________________ ______________ DATE

____
TITLE

______________________________ ______________ DATE
ttorney for Appellant

, ______________ hereby attest that I am the ______________ of and that ______________, who signed n behalf of said Company, is empowered to bind the Company in his matter.

5. IMPLEMENTATION CONSIDERATIONS

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PROTECTING CONFIDENTIALITY IN MEDIATION

As mediation gains popularity as an alternative to adversarial justice,[1] it becomes increasingly important to define the degree to which rules of privilege should guarantee the confidentiality of communications made in mediation. Confidentiality fosters an atmosphere of trust essential to mediation.[2] Under current law, however, it is far from clear that a mediator can back up a promise that everything said in mediation will remain confidential[3] if a dissatisfied participant later goes to court seeking testimony regarding a mediation session.[4] Confusion about the status of confidentiality in mediation has grown so serious that it has burdened mediation programs[5] and generated both litigation and legislation.

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[1] In recent years, some observers have perceived a crisis in courts' caseloads and in public satisfaction with the judicial system. *See, e.g.*, L. Cooke, Mediation: A Boon or a Bust? 1 (May 20, 1982) (remarks at John Jay College) (on file at Harvard Law School Library); *cf.* H.R. Rep. No. 492 (pt. 1), 96th Cong., 2d Sess. 13–14, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3, 5–6 (recognizing need for improved methods of resolving minor disputes). Many have suggested mediation as a response to these problems, *see id.* at 14, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 5; *cf.* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 747, 752 (1981) (Burger, C.J., dissenting) (criticizing majority's lack of sensitivity to importance of alternative methods of dispute resolution), and mediation is increasingly being used to resolve family disputes, small claims, and minor criminal complaints, *see* ABA, Dispute Resolution Program Directory (1981) (listing mediation programs in various fields). Federal labor mediation takes place under the auspices of the Federal Mediation and Conciliation Service, *see* 29 U.S.C. §§ 171–172 (1982), and the National Mediation Board, *see* 45 U.S.C. §§ 151–188 (1982). The EEOC may use mediation to resolve claims of unlawful employment practices. *See* 42 U.S.C. § 2000e-5(b) (1982).

[2] Mediation requires an atmosphere free of "restraint and intimidation," Act of July 27, 1981, 1981 N.Y. Laws 2262 (establishing community dispute resolution centers), *amended by* Act of May 29, 1984, 1984 N.Y. Laws 285 (repealing sunset provision), in which parties may frankly discuss feelings and positions.

[3] A promise of confidentiality is generally considered a prerequisite to mediation. *See, e.g.*, Felstiner & Williams, *Mediation as an Alternative to Criminal Prosecution: Ideology and Limitations*, 2 Law & Hum. Behav. 223, 227 (1978). New York funds mediation programs only if they guarantee confidentiality. *See* N.Y. Jud. Law § 849-b(3), -b(6) (McKinney Supp. 1983–1984). Programs in "neighborhood justice centers" set up by the Department of Justice generally conduct hearings employing procedures used by the Institute for Mediation and Conflict Resolution and the American Arbitration Association — procedures that emphasize confidentiality. *See* R. Cook, J. Roehl & D. Sheppard, Neighborhood Justice Centers Field Test: Final Evaluation Report 18 (1980); Felstiner & Williams, *supra*, at 227. Reasonable protection of privacy is required of any program that might be funded under the Dispute Resolution Act § 4(4)(F), 28 U.S.C. app. § 4(4)(F) (1982); H.R. Rep. No. 492 (pt. 1), *supra* note 1, at 16–17, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 8.

[4] A request for testimony is the most common threat to confidentiality. *See* Freedman, *Confidentiality: A Closer Look*, in ABA Special Comm. on Dispute Resolution of the Pub. Servs. Div., Alternative Dispute Resolution: Mediation and the Law 68, 72 (1983). Lawrence Freedman has said that "it wouldn't really be honest to say [that mediation is confidential] to people who are considering participating." ABA Special Comm. on Dispute Resolution of the Pub. Servs. Div., *supra*, at 57 (remarks during panel discussion).

Historically, statutory protection has been granted to certain communications made in the mediation of labor disputes[6] and family matters, especially issues arising in divorce proceedings.[7] As mediation is extended to new areas, such as resolving minor criminal matters, statutory protection of confidentiality is being extended as well.[8] While several recent statutes offer almost complete protection,[9] others provide only a limited privilege.[10]

In varying degrees these statutes recognize two discrete privileges. The first privilege protects communications made during mediation from compulsory process sought during subsequent litigation.[11] The second privilege shields the mediator from being forced to testify.[12] These privileges, like any others, might be limited either by legislative solicitude for the interests of third parties[13] or by the need to ensure the integrity of mediation itself. This Note focuses on limitations responsive to the latter concern. It examines mediation privileges primarily in the context of civil disputes[14] and outlines the salient features of a privilege statute that would enhance the effectiveness of mediation as a private method for resolving disputes. Part I distinguishes mediation from other forms of dispute resolution and underscores the importance of confidentiality to the process. Part II considers attempts to preserve confidentiality through traditional rules of evidence and through contracts among the mediating parties. Part III proposes a model for the statutory protection of confidentiality and for a mediator's testimonial privilege. The model departs from absolute privilege only when necessary to preserve the integrity of the mediation process.

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[5] Freedman, *supra* note 4, at 68–69 (noting that programs often cannot bear the costs of defending confidentiality).

[6] *See e.g.*, CAL. LAB. CODE § 65 (West 1971); CONN. GEN. STAT. ANN. §§ 31-96, -100 (West 1972 & Supp. 1984). One legislature passed its confidentiality statute, Act of April 10, 1917, 1917 N.H. Laws 646 (codified at N.H. REV. STAT. ANN. § 273:18 (1977)), during litigation of a case that resulted in denial of a confidentiality claim. *See* White Mountain Freezer Co. v. Murphy, 78 N.H. 398, 101 A. 357 (1917).

[7] *See, e.g.*, CAL. CIV. PROC. CODE § 1747 (West 1982) (treating communications to domestic conciliator as official communications covered by qualified privilege). The Oregon statute, OR. REV. STAT. § 107.600 (1983), which had closely resembled the California provision, was amended in 1981 to provide complete confidentiality. *See* An Act Relating to evidence, 1981 Or. Laws 1374, 1391.

[8] *See, e.g.*, CONN. GEN. STAT. ANN. § 54-56m (West Supp. 1984); N.Y. JUD. LAW § 849-b(6) (McKinney Supp. 1983–1984).

[9] *See* N.Y. JUD. LAW § 849-b(6) (McKinney Supp. 1983–1984) (providing that "[a]ny communication relating to the subject matter" of mediation is a "confidential communication"); OKLA. STAT. tit. 12, § 1805(C) (Supp. 1983) (prohibiting disclosure of "any matters discussed" in mediation); OR. REV. STAT. § 107.600 (1983) (providing complete confidentiality).

[10] *See, e.g.*, CAL. CIV. PROC. CODE § 1747 (West 1982) (providing a privilege in domestic conciliation that is subject to case-by-case balancing under § 1040 of the California Evidence Code); COLO. REV. STAT. § 13-22-307 (Supp. 1983) ("Mediation proceedings shall be regarded as settlement negotiations."). The limits to the protection that can be inferred by analogy to settlement negotiations are discussed on pp. 447–50.

[11] *See, e.g.*, CAL. CIV. PROC. CODE § 1747 (West 1982); N.Y. JUD. LAW § 849-b(6) (McKinney Supp. 1983–1984).

[12] *See, e.g.*, COLO. REV. STAT. § 13-22-307 (Supp. 1983); 29 C.F.R. § 1401.2(b) (1983) (labor mediator).

[13] *See* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (J. McNaughton rev. ed. 1961) (privileges are generally limited when the benefit of doing so outweighs the cost associated with injuring the protected relationship); *infra* note 111.

[14] The need for confidentiality in the mediation of minor criminal disputes is discussed in Freedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 CAP. U.L.

I. MEDIATION AND THE NEED FOR CONFIDENTIALITY

Any view of the appropriate protection of the confidentiality of mediation must derive from a normative conception of mediation itself. This Note conceives mediation as an essentially contractarian process in which the mediator helps the parties exercise their right to negotiate agreements in order both to settle disputes[15] and to structure future relationships. This process differs significantly from adjudication,[16] in that mediation is essentially a form of negotiation:[17] the

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REV. 181, 196–213 (1981), and Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System — An Overview and Legal Analysis*, 29 AM. U.L. REV. 17, 72–81 (1979). Though many criminal mediation programs do not provide for direct civil enforcement of agreements, *see id.* at 27, the rules developed in this Note could apply to those that do, as long as the rules meet any further due process requirements that might be present in a criminal case.

[15] The right of parties to settle claims privately has long been recognized. *See, e.g.*, Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910); United States v. City of Miami, 614 F.2d 1322, 1330 (5th Cir. 1980).

For representative definitions of mediation, see Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1 MEDIATION Q. 3, 7 (1983), and Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 88 (1981). Models of mediation less contractarian in nature have been proposed to deal with disputes in which major public interests are at stake, such as conflicts over environmental issues. *See* Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 1–8, 40–46 (1981). If the mediator assumes a more active role, such as enforcing community norms or representing absent interests, further limits to any privilege may be needed to enforce the mediator's increased responsibilities.

[16] *See* Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307–08 (1971); L. Cooke, *supra* note 1, at 3. Arbitration is no more than private adjudication: "Arbitrators are judges chosen by the parties to decide the matters submitted to them." Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1854). Like judges, arbitrators impose rules rather than help parties create rules for themselves. *See* Fuller, *supra*, at 328; T. McFadgen, Dispute-Resolution in the Small Claims Context: Adjudication, Arbitration, or Mediation? 69 (1972) (unpublished LL.M. thesis on file in Harvard Law School Library).

[17] *See* W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 30 (1971); Stulberg, *supra* note 15, at 89, 91; G. Cormick, Environmental Mediation in the U.S.: Experience and Future Directions 3 (1981) (unpublished manuscript) (mediation "is nothing more or less than a device for facilitating the negotiation process"), *quoted in* McCrory, *Environmental Mediation — Another Piece for the Puzzle*, 6 VT. L. REV. 49, 53 n.16 (1981).

parties reach agreement voluntarily[18] and thus retain the power to shape both the agenda for discussion and the ultimate agreement.[19] The mediator, unlike a judge, acts primarily as a catalyst for this process;[20] he cannot compel the production of information,[21] and he does not render judgment by applying preordained rules to the dispute after hearing reasoned argument.[22] Instead, he helps the parties reach agreement by identifying issues, exploring possible bases for agreement and the consequences of not settling, and encouraging each party to accommodate the interests of other parties.[23] Moreover, because parties in mediation can discuss their dispute on their own terms without confining themselves to issues and facts relevant to a legal cause of action,[24] they may discover the otherwise hidden causes of conflict between them and arrive at a more satisfactory and lasting resolution to the dispute.[25] At best, mediation can turn conflict into a constructive process;[26] at the very least, it gives parties a chance to preserve ongoing relationships or make the termination of a relationship less destructive.[27]

The mediator's inability to coerce the parties, however, makes it essential that he be able to make a simple and credible promise of confidentiality.[28] The mediator may be aided in fostering agreement by the force of his personality or his stature in the community, by a community tradition of nonjudicial dispute resolution, or by a requirement that the parties participate in the mediation session.[29] To assess the possibilities of settlement fully, however, the mediator must understand the "motives and possibly even bona fides of the conduct of each party";[30] in other words, he must be apprised of the parties' real positions and interests. The efficacy of this factfinding process depends on the mediator's ability to ensure the confidentiality of communications made to him.[31] Indeed, this need for confidentiality is as important to the effectiveness of mediators as it is to that of attorneys,[32] physicians,[33] or psychiatrists.[34]

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[18] *See, e.g.*, COLO. REV. STAT. § 13-22-302(3) (Supp. 1983); OKLA. STAT. tit. 12, § 1804(A) (Supp. 1983); W. SIMKIN, *supra* note 17, at 28.

[19] *See* Stulberg, *supra* note 15, at 91.

[20] *Id.* Neutrality should not be equated with passivity. *See id.* at 92. The mediator, besides attempting to further agreement, may on occasion inject his own ethical concerns into mediation. *See* W. SIMKIN, *supra* note 17, at 38–40; Stulberg, *A Civil Alternative to Criminal Prosecution*, 39 ALB. L. REV. 359, 371–75 (1975).

[21] Arbitrators do enjoy such a power. *See* UNIFORM ARBITRATION ACT § 7, 7 U.L.A. 44 (1978).

[22] "No adjudication, sanction, or penalty may be made or imposed by any mediator . . . ." COLO. REV. STAT. § 13-22-305(5) (Supp. 1983); *cf.* Fuller, *Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363–67 (1978) (contrasting adjudication and contract as means of ordering social relations).

[23] *See* COLO. REV. STAT. § 13-22-302(4) (Supp. 1983) (mediator "assists disputants . . . by identifying and evaluating alternatives"); CODE OF PROFESSIONAL CONDUCT FOR LABOR MEDIATORS §§ I, V (Federal Mediation & Conciliation Service 1964), *reprinted in* 29 C.F.R. pt. 1400 app., §§ I, V (1983); Stulberg, *supra* note 15, at 88; *cf.* R. FISHER & W. URY, GETTING TO YES (1981) (discussing the elements of principled negotiation).

[24] For illustrations of the range and unpredictability of issues that may surface in mediation, see ABA SPECIAL COMM. ON DISPUTE RESOLUTION OF THE PUB. SERVS. DIV., *supra* note 4, at 29, and Felstiner & Williams, *supra* note 3, at 229–43.

[25] Mediation's success may be measured by parties' satisfaction with the process and the resulting agreements, and by the rate of compliance with mediated settlements. For data showing that mediation compares favorably with adjudication on these criteria, see McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 254–64 (1981), and L. Cooke, *supra* note 1, at 11.

[26] *See* Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 26 Supp. AM. J. COMP. L. 205, 207–08 (1978); Stulberg, *supra* note 15, at 92. Although mediation may be constructive and educational, it remains fundamentally goal-oriented. *See* Folberg, *supra* note 15, at 8.

[27] *See* Fuller, *supra* note 16, at 308.

Mediation demands, moreover, that the parties feel free to be frank not only with the mediator but also with each other. Mediation is not just "shuttle diplomacy"; much takes place in joint sessions[35] attended by the mediator and the parties. Agreement may be impossible if the mediator cannot overcome the parties' wariness about confiding in each other during these sessions. Accordingly, effective mediation demands that the parties be privileged not to testify about communications they have made to each other in the course of mediation.

Finally, protection of the mediator's status as a neutral[36] demands recognition of a distinct privilege on his part not to testify. This privilege must be assertable by the mediator when necessary to protect his interest in neutrality, or on the motion of a party, when necessary to protect party expectations. Both the appearance and the reality of the mediator's neutrality are essential to generating the climate of trust necessary for effective mediation.[37] Recognition of a mediator's privilege not to testify will bolster the parties' confidence in the integrity of the process by assuring them that the mediator is truly a neutral conciliator and not a potential adversary in later litigation.

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[28] *See* Stulberg, *supra* note 15, at 96–97.

[29] Mediation has become mandatory in certain contexts. *See, e.g.*, International Ass'n of Machinists v. National Mediation Bd., 425 F.2d 527, 541 (D.C. Cir. 1970) (labor mediation under the Railway Labor Act); CAL. CIV. CODE § 4607 (West Supp. 1984) (custody and visitation rights).

[30] *International Ass'n of Machinists*, 425 F.2d at 540.

[31] Of course, mediators themselves must respect confidentiality. *See, e.g.*, CODE OF PROFESSIONAL CONDUCT FOR LABOR MEDIATORS § V (Federal Mediation & Conciliation Serv. 1964), *reprinted in* 29 C.F.R. pt. 1400 app., § V (1983); CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS 3 (Colorado Council of Mediation Orgs. 1982) (exception for child abuse and for probable crime that may result in drastic physical or psychological harm to another).

[32] *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 390 (1981) ("[T]he privilege exists to protect . . . the giving of information to the lawyer . . . .").

[33] *See, e.g.*, Hardy v. Riser, 309 F. Supp. 1234, 1238 (N.D. Miss. 1970) (interpreting Mississippi law in diversity).

[34] *See, e.g.*, United States v. Layton, 90 F.R.D. 520, 526 (N.D. Cal. 1981).

[35] *See, e.g.*, Kraybill, *A Procedure for Mediating Inter-Personal Disputes*, in L. BUZZARD & R. KRAYBILL, MEDIATION: A READER (rev. ed. 1982) (outlining typical mediation procedures).

[36] This concern for neutrality is reflected in other practices. For example, without party consent, mediators generally may not serve as arbitrators in cases they have mediated, because combining mediation with the adjudicatory function of an arbitrator imperils the success of mediation and calls into question the fairness of arbitration. *See* T. McFadgen, *supra* note 16, at 87, 89; *cf.* Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 24 (noting the difficulty of switching from role of mediator to that of judge). *But see* Stulberg, *supra* note 20, at 367–68 (defending practice of combining aspects of mediation and arbitration). Statutory schemes mandating both mediation and arbitration generally reflect this concern. *See, e.g.*, Conciliation and Arbitration Act of 1904, § 22(2), 3 AUSTL. ACTS P. 231, 251 (1974). Similarly,

The need to protect both mediator-party and party-party communications and to grant the mediator a testimonial privilege has been recognized since the last century.[38] The next section examines the extent to which traditional doctrine might be relied on to protect communications made in mediation.

II. Traditional Doctrine and Its Limits

Modern statutes creating privileges for mediation have preserved the confidential nature of communications both among the parties and between the mediator and the parties. For decades, mediator-party communications in labor conciliation have received statutory protection,[39] and recent statutes have extended this protection to mediation in other arenas.[40] The confidentiality of communications among the parties, on the other hand, has traditionally received less legislative regard.[41] In the absence of specific statutory treatment — the situa-

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attorneys who undertake to act as mediators should not represent either party in subsequent litigation. *See* Model Code of Professional Responsibility EC 5-20 (1979).

[37] *See* McCrory, *supra* note 17, at 56; Stulberg, *supra* note 15, at 87, 95–96.

[38] All three forms of protection appear to have been present in one historical model for small claims courts: the Scandinavian conciliation courts. *See* T. McFadgen, *supra* note 16, at 76–78. Conciliation was "'carried on with closed doors, and the commissioners [were] bound to secrecy. . . . Admissions or confessions made by one party [could not] be used against him by his adversary should the case come to trial in the regular court.'" *Id.* at 77 (quoting Grevstad, *Norway's Conciliation Tribunals*, 2 J. Am. Judicature Soc'y 5 (1918)). Early conciliation efforts in the United States are described in R. Smith, Justice and the Poor 63 (3d ed. 1924) (discussing conciliation program in Cleveland), and in Note, *Conciliation in the Municipal Court for the District of Columbia*, 34 Geo. L.J. 352 (1946). The District of Columbia program showed more concern for keeping conciliation and adjudication separate, and enjoyed a higher rate of success, than the Cleveland program did. *Compare* R. Smith, *supra*, at 63 (30% of cases settled in 1914 and 18% settled in 1915), *with* Note, *supra*, at 360 (over 87% settled).

[39] *See, e.g.*, Conn. Gen. Stat. § 31-100 (1972 & Supp. 1983–1984). The privilege is akin to that granted communications to government officials, *see, e.g.*, State *ex rel.* Douglas v. Tune, 199 Mo. App. 404, 413, 203 S.W. 465, 467 (1918) (communications to complaint board "highly confidential" since board members "must rely almost entirely upon information voluntarily given to them"); *see also* Cal. Civ. Proc. Code § 1747 (West 1982) (applying to mediation the qualified privilege accorded statements to government officials).

[40] *See, e.g.*, statutes cited *supra* note 7 (divorce proceedings).

[41] *Compare* Cal. Civ. Proc. Code § 1747 (West 1982) (protecting statements made to mediator) *with* Mich. Comp. Laws. Ann. § 552.513(3) (West Supp. 1984–1985) (protecting

tion in most jurisdictions — the protection extended any communication made in mediation is a product of either contract or the rules governing admission of evidence regarding settlement negotiations.[42] Although the traditional rules fail to provide a legal framework that adequately protects mediation, they nonetheless suggest policy concerns that any model of a privilege for mediation should take into account.

A. Protection Under the Rules of Evidence

1. Minimal Protection: The Common Law. — Any common law protection of confidentiality in mediation must derive from the exclusion of evidence of offers to compromise. Most American courts[43] have construed this exclusion narrowly, adopting what has been termed the "relevancy rule."[44] Under this rule, evidence of a proposed compromise is excluded because it is generally considered not to be reliable evidence of the value of the offeror's claim.[45] Thus conceived, the exclusion is foremost a means to ensure the probative value of evidence, not to enhance the efficacy of settlement negotiations.[46]

The relevancy rule has led to a distinction between "mere" offers to compromise, which are excluded, and independent admissions of fact, which are not.[47] This distinction has bred controversy and confusion.[48] Courts have generally identified independent admissions

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communications made to mediator as well as "communications between the parties in the presence of the mediator").

[42] *See generally* Freedman, *supra* note 4 (discussing such protections of confidentiality in mediation, as well as existing statutes); Friedman, *supra* note 14 (same).

[43] In order to protect the confidentiality of domestic conciliation, English common law courts have found an implied agreement that conciliation was "without prejudice" and that statements made in conciliation would not be used in subsequent litigation. *See* Pool v. Pool, 1951 P. 470; Mole v. Mole, 1951 P. 21, 23 (C.A. 1950); LAW REFORM COMMITTEE, SIXTEENTH REPORT, CMD. No. 3472, at 15 (1967).

[44] *See* 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1061, at 36 (J. Chadbourne rev. ed. 1972); Bell, *Admissions Arising out of Compromise — Are They Irrelevant?*, 31 TEX. L. REV. 239, 241 (1953).

[45] *See* 4 J. WIGMORE, *supra* note 44, § 1061, at 36.

[46] Despite the urgings of commentators that courts base exclusion on a broader "privilege theory" explicitly encouraging compromise, *see* Bell, *supra* note 44, at 251; Tracy, *Evidence — Admissibility of Statements of Fact Made During Negotiation for Compromise*, 34 MICH. L. REV. 524, 528–30 (1936), only a few courts have done so, *see, e.g.*, Connor v. Michigan Wis. Pipe Line Co., 15 Wis. 2d 614, 622, 113 N.W.2d 121, 125 (1962) ("[T]he overwhelming weight of precedent is against invoking such an all-inclusive rule of privilege even though there may be strong reasons of logic and public policy in favor thereof.").

[47] *See* Sanborn v. Neilson, 4 N.H. 501, 508–09 (1828); 4 J. WIGMORE, *supra* note 44, § 1061, at 41; Tracy, *supra* note 46, at 524.

[48] *See* FED. R. EVID. 408 advisory committee note. *Compare* Harrison v. District of Columbia, 95 A.2d 332, 334 (D.C. 1953) (excluding evidence of offer prefaced by "absolute denial" of liability), *with* Pitts v. United States, 95 A.2d 588, 589 (D.C. 1953) (admitting evidence of offer reserving "the right to plead formally").

in one of two ways. First, they have looked to the form of the statement: an admission stated by a party to be without prejudice — that is, one by which the party does not intend to be bound in subsequent litigation — will generally not be deemed independent.[49] This method of analysis is unsuited to an informal process like mediation because it protects only those with knowledge of the law[50] and discourages negotiation without counsel.[51] Second, courts have associated independent admissions with "explicit and absolute" statements.[52] But identifying such statements requires an intrusive probing of the intention of the speaker,[53] and the outcome of the inquiry is highly unpredictable. As a result, the "practical value of the common law rule has been greatly diminished,"[54] and the rule can adequately protect neither communications among the parties nor communications between the parties and the mediator.[55]

2. Enhanced Protection: Federal Rule of Evidence 408. — Federal Rule of Evidence 408 — and similar provisions in effect in about half the states[56] — is another possible source of legal protection for communications made in mediation. The rule provides that an offer of compromise is "not admissible to prove liability for or invalidity of the claim or its amount"; it also provides that "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible."[57] Rule 408 implicitly rejects the common law version of the relevancy theory, in that it excludes both offers of compromise and evidence of conduct or statements made during compromise negotiations. The rule thus affords broader protection to the negotiation of private settlements than does the common law. Moreover, the policy behind the rule — the promotion of "free and frank" discussions of settlement proposals[58] — is also a goal of mediation. Thus, not surprisingly, commentators have argued that the more generous protection of Rule 408 should extend to mediation.[59] This view has some judicial support,[60] and the Colorado legislature has expressly deemed mediation sessions to be settlement negotiations for evidentiary purposes.[61]

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[49] *See In re* Evansville Television, Inc., 286 F.2d 65, 70 (7th Cir.), *cert. denied*, 366 U.S. 903 (1961).

[50] The common law rule has been recognized as a "trap for the unwary." S. REP. NO. 1277, 93d Cong., 2d Sess. 10 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7057; *see* G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 107 (1983).

[51] *See* Annot., 15 A.L.R.3D 13, 20 (1967) (advising that counsel, not party, should conduct negotiations).

[52] *See* People *ex rel.* Department of Pub. Works v. Forster, 58 Cal. 2d 257, 264, 23 Cal. Rptr. 582, 586, 373 P.2d 630, 634 (1962); 4 J. WIGMORE, *supra* note 44, § 1061, at 41.

[53] *See Forster*, 58 Cal. 2d at 263–67, 23 Cal. Rptr. at 586–87, 373 P.2d at 634–35; Colburn v. Groton, 66 N.H. 151, 155–57, 28 A. 95, 97 (1889).

[54] FED. R. EVID. 408 advisory committee note.

[55] Statements made to or through another are subject to the same exclusionary rule — and the same exception. *See* Harrington v. Inhabitants of Lincoln, 70 Mass. (4 Gray) 563, 567 (1855) (offer to an agent excluded); 29 AM. JUR. 2D *Evidence* § 632 (1967 & Supp. 1983) (compromises with third parties excluded).

[56] *See e.g.*, Hatfield v. Max Rouse & Sons N.W., 100 Idaho 840, 846, 606 P.2d 944, 950 (1980) (adopting federal rule). States adopting rules paralleling Rule 408 are noted in 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 408[08], at 408-32 to -37 (1982 & Supp. 1984).

[57] FED. R. EVID. 408.

The broad protection conferred by Rule 408, however, has one very significant limitation: it excludes evidence of negotiations only when offered to prove the validity or amount of the plaintiff's claim. Some of the consequences of this limitation are undoubtedly desirable. The rule does not, for example, exclude evidence offered to prove or challenge the actual agreement produced by the negotiations;[62] otherwise, the agreement might not be enforceable and mediation itself would be ineffective. Moreover, the rule does not protect participants in negotiation who abuse the negotiation process by committing fraud or by violating a duty owed to another participant, such as a duty to bargain in good faith; presumably, this limitation would apply to mediation as well. Additionally, under the rule, information otherwise discoverable is not immunized from discovery simply because it is presented in negotiation.[63] Negotiation — or mediation — should not be a barrier to discovery any more than it should be a tool for discovery.[64]

Other ramifications of the rule's limited scope, however, seriously undermine its ability to promote the free discussion essential to mediation. Since the exclusion applies only to proof of the validity or amount of the plaintiff's claim, the rule would not exclude evidence offered to support or rebut technically distinct yet related claims raised after mediation.[65] As a result, the parties would be forced to assess the legal scope of their claims before deciding how much to reveal, and the freewheeling discussion that is the hallmark of mediation would thus be chilled. More generally, the rule does not prevent collateral use of statements made during settlement negotiations: such statements may be used to prove anything from bias to agency.[66] As a result, Rule 408 does not adequately prevent communications made in mediation from being used by one party against another[67] in subsequent litigation.[68]

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[58] 2 J. WEINSTEIN & M. BERGER, *supra* note 56, ¶ 408[01], at 408-9.

[59] *See* Freedman, *supra* note 4, at 75; Friedman, *supra* note 14, at 204–05.

[60] *See* EEOC v. Air Line Pilots Ass'n, 489 F. Supp. 1003, 1008 n.4 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981).

[61] *See* COLO. REV. STAT. § 13-22-307 (Supp. 1983).

[62] Such suits are not based on the plaintiff's claim but on the agreement. *See* Moving Picture Mach. Operators Union Local No. 162 v. Glasgow Theatres, Inc., 6 Cal. App. 3d 395, 402, 86 Cal. Rptr. 33, 37 (1970) (evidence of accord and satisfaction not excluded by state rule similar to Rule 408); *see also infra* note 84 (discussing suits on settlement agreements).

[63] *See* FED. R. EVID. 408. Yet "where the document, or statement, would not have existed but for the negotiations," it is not discoverable, since "the negotiations are not being used as a device to thwart discovery by making existing documents unreachable." Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1107 (5th Cir. May 1981) (Unit B); *cf.* COLO. REV. STAT. § 13-22-307 (Supp. 1983) (allowing discovery of "otherwise discoverable" material).

[64] Of course, it is never possible to preclude all risk that mediation may result in discovery, since mediation may yield clues about what "otherwise discoverable" information should be sought.

[65] *See* EEOC v. Air Line Pilots Ass'n, 489 F. Supp. 1003, 1010 n.8 (D. Minn. 1980) (admitting evidence from conciliation proceedings as an aid in determining allocation of damages), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981).

B. Contract: Flexible Protection Without Legislation?

An alternative method of protecting confidentiality that comports well with the voluntary nature of mediation is the use of contracts. Many mediation programs rely on contracts between participants in mediation in order to guarantee confidentiality;[69] others have reached informal arrangements with courts and prosecutors' offices to protect mediation sessions.[70]

Nonetheless, the validity of contracts restricting the use of evidence in judicial proceedings is the subject of some doubt. Although some commentators have argued that such contracts should be respected,[71] there is a risk that they will be found "void as against public policy."[72] At least one court has considered the validity of such a contract as applied to mediation and chose to enforce it.[73] Yet the court enforced the contract only after balancing the traditional policy in favor of admitting all competent evidence against a specific statutory policy favoring reconciliation.[74] In the absence of such a statute, a court could balance the policy in favor of admitting all competent evidence against only the general policy favoring compromise; since this policy failed to support broad protection of settlement discussions at common law, the contract might not be enforced.

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[66] *See, e.g.*, Breuer Elec. Mfg. Co. v. Toronado Sys. of Am., 687 F.2d 182, 185 (7th Cir. 1982) (evidence admitted for purposes of impeachment); Lloyd v. Thomas, 195 F.2d 486, 491 (7th Cir. 1952) (evidence admitted to rebut claim of agency). Although the dangers inherent in such uses may be reduced by generous interpretation of Rule 408, *see* 2 J. WEINSTEIN & M. BERGER, *supra* note 56, ¶ 408[05], at 408-28 to -29 (rule should not be limited in a way that undercuts its goal of encouraging settlement negotiations), they cannot be eliminated.

[67] Furthermore, Rule 408's limitation to evidence offered to prove the validity of the plaintiff's claim provides no protection to nonparty participants in mediation. By contrast, evidence rules do protect parties against some uses of evidence by nonparties. *See infra* note 75.

[68] Developments in two states suggest recognition of the inadequacy of relying on traditional protections for settlement negotiations to protect mediation. Although Colorado extends to mediation the same statutory protection afforded to settlement negotiations, *see* COLO. REV. STAT. § 13-22-307 (Supp. 1983), it has been recommended that participants in mediation expressly agree to make sessions confidential, *see* CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS 3–4 (Colorado Council of Mediation Orgs. 1982); Freedman, *supra* note 4, at 83 & n.62. Moreover, despite an indication that its courts might protect divorce mediation by analogy to settlement negotiations, *see id.* at 72–73, the Florida legislature passed a statute to expand such protection, *see* An Act Relating to Dissolution of Marriage, 1982 Laws 233, 235 (codified at FLA. STAT. ANN. § 749.01(3) (West Supp. 1984)).

[69] *See, e.g.*, Freedman, *supra* note 4, at 80 (providing an example of such an agreement).

[70] *See id.* at 81–82.

[71] *See* 1 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 7a, at 560 (P. Tillers rev. ed. 1983). One might argue, for example, that an agreement to exclude evidence from a mediation session is in effect an agreement that everything said or done in mediation was "without prejudice" and that the court should therefore treat the negotiation as such. *See supra* pp. 447–48. This approach is not unlike the English approach to domestic conciliation. *See supra* note 43. An essentially contract-based argument has been employed to support the mediator's privilege in labor mediation: it is argued that since the parties are made aware of the mediator's inability to testify by 29 C.F.R. § 1401.2(b) (1983), they have impliedly consented to that condition, *see* NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 56 (9th Cir. 1980); Drukker

A further danger in relying on contracts to preserve confidentiality is that they may not protect the participants in mediation from all seekers of information. Because contracts bind only the contracting parties, they cannot preclude use of evidence by a noncontracting party such as a prosecutor's office or the public.[75] The problem is particularly acute when the mediation program is affiliated with a court or prosecutor's office that is tempted to exploit the program for purposes of discovery.[76] Similarly, problems may arise when the program receives funds from a government entity, since its records may then be subject to local "freedom of information" acts.[77] Although agreements with prosecutors and courts may enable mediation programs to provide limited protection against inquiries by nonparties,[78]

Communications, Inc. v. NLRB, 700 F.2d 727, 734 (D.C. Cir. 1983) (dictum) (party knowledge of NLRB agent's inability to testify would be relevant to claim of privilege by the agent).

[72] Cronk v. State, 100 Misc. 2d 680, 686, 420 N.Y.S.2d 113, 117–18 (Ct. Cl. 1979) (agreement would not bar evidence even were it a contract); *see also* Garden State Plaza Corp. v. S.S. Kresge Co., 78 N.J. Super. 485, 500–03, 189 A.2d 448, 456–58 (App. Div.) (disapproving Wigmore's position that such a contract is enforceable and holding that parol evidence rule governs access to evidence of negotiations), *cert. denied*, 40 N.J. 226, 191 A.2d 63 (1963); Note, *Contracts To Alter the Rules of Evidence*, 46 HARV. L. REV. 138, 142–43 (1932) ("[A] contract to deprive the court of relevant testimony . . . is an impediment to ascertaining the facts."). The disinclination of courts to allow parties to create their own privileges is consistent with the rule that "[n]o pledge of privacy . . . can avail against demand for the truth in a court of justice." 8 J. WIGMORE, *supra* note 13, § 2286, at 528.

[73] *See* Simrin v. Simrin, 233 Cal. App. 2d 90, 95, 43 Cal. Rptr. 376, 379 (1965).

[74] *Id.* (citing CAL. CIV. PROC. CODE § 1747).

[75] By contrast, the rules of evidence do not protect only parties in privity with each other. For example, evidence of an offer to compromise or of a settlement agreement is generally not admissible in litigation involving one of the parties and arising out of the same transaction that the settlement discussions were concerned with. *See, e.g.*, Bratt v. Western Air Lines, 169 F.2d 214, 217 (10th Cir.), *cert. denied*, 335 U.S. 886 (1948); Brown v. Pacific Elec. Ry., 79 Cal. App. 2d 613, 180 P.2d 424 (1947). *But see* General Motors Corp. v. Simmons, 558 S.W.2d 855, 857 (Tex. 1977) (admitting evidence for purpose of showing bias).

[76] *See* Freedman, *supra* note 4, at 70–71.

[77] *See* Rice, *supra* note 14, at 76–79. The Freedom of Information Act, 5 U.S.C. § 552 (1982), exempts certain "commercial or financial information," *id.* § 552(b)(4), which includes "negotiating positions or requirements in the case of labor-management mediations," H.R. REP. NO. 1497, 89th Cong., 2d Sess. 10, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418, 2427.

[78] *See* Freedman, *supra* note 4, at 82.

only legislation can fully protect participants against the claims of outsiders.

III. Toward a New Model of Protection

Recent legislative enactments in several states have provided near-absolute protection for communications made in mediation, whether among the parties or with the mediator.[79] Though this approach creates a straightforward rule suitable to an informal process,[80] it is an overreaction to the shortcomings of evidentiary rules and contractual arrangements. Any protection of mediation must recognize the limits imposed on confidentiality by the nature of a negotiation process itself, and must also articulate conditions for compelling mediator testimony that adequately protect the mediator's neutrality. This Section sketches guidelines for enacting such protection into law.

A. Protection of Communications

Recent statutes greatly enhance the protection available to mediation under the traditional rules of evidence and contract. These statutes do not limit the confidentiality of communications on the basis of the form of the communication, the presumed intent of its speaker, or the scope of the plaintiff's legal claims. Rather, the statutes in general grant blanket protection to all communications made in mediation.[81]

Although broad statutory protection is important to the success of mediation, the recent statutes have generally failed to retain two important exceptions provided in the rules of evidence, exceptions that are crucial to the integrity of mediation. The first exception recognizes that confidentiality must yield to a demonstrable need for parol evidence when one of the parties to a mediation agreement sues to enforce or rescind that agreement.[82] The second exception guards against abuse of the mediation process by allowing confidentiality to be pierced when a party brings suit alleging the breach of a duty owed by another party or the mediator in the course of mediation, such as an obligation to bargain in good faith.[83]

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[79] *See e.g.*, FLA. STAT. ANN. § 749.01(3) (West Supp. 1984); N.Y. JUD. LAW § 849-b(6) (McKinney Supp. 1983–1984); OKLA. STAT. tit. 12, § 1805 (Supp. 1983).

[80] *Cf.* Dispute Resolution Act § 4(4), 28 U.S.C. app. §4(4) (1982) (requiring that rules of federally financed dispute resolution programs be "reasonable, fair, and readily understandable").

[81] At least one statute limits this protection to communications related "to the subject matter" of the mediation. *See* N.Y. JUD. LAW § 849-b(6) (McKinney Supp. 1983–1984). Restriction of protection to the subject matter of a session, unless construed with sensitivity to the freewheeling nature of mediation, may chill discussion in much the same way as would limiting protection to matters related to the scope of a claim.

[82] *See supra* p. 449.

[83] *See supra* p. 449. A high threshold is often set for mediator liability. *See infra* p. 453 & note 87.

The failure to provide for the use of parol evidence when necessary to a suit to rescind or enforce an agreement reached in mediation is the greatest defect in the new statutes. By treating mediated contracts differently from other settlement agreements,[84] the statutes undermine parties' legitimate interests both in realizing the fruits of mediation and in protecting themselves from fraud, duress, and mistake. As a result, the new statutes may detract from the very climate of truthfulness that confidentiality should foster. Although confidentiality is crucial to preserving the position of parties that have failed to reach an agreement, parties that have reached agreement should not be forced to purchase free discussion at the cost of waiving traditional contract law protection against unfairness.

Moreover, all parties to mediation, successful and unsuccessful, have an interest in seeing that any legal duties owed them in the course of mediation are honored. In many areas of relatively informal mediation — such as small claims mediation — these "duties" may not reach much beyond not assaulting one's adversary. In a more structured field such as labor mediation, however, such duties are more extensive.[85] Obligations to bargain in good faith or to reduce an agreement to writing do not evaporate when parties enter mediation, and enforcing these obligations may require use of evidence from mediation sessions.[86] Moreover, even in the course of mediation unconstrained by a legal bargaining structure, the mediator may owe the parties a minimal duty of care,[87] the enforcement of which may require waiver of confidentiality.[88]

A statute broadening the privilege protecting communications made in mediation should thus provide for the proof of such communications when necessary to enforce — or resist enforcement of — a mediated agreement, or when needed by a party to enforce a duty owed him by the mediator or another party in the course of mediation. The statute, however, must carefully distinguish between protecting the confidentiality of communications among the parties themselves and protecting the confidentiality of private communications between a party and the mediator; these latter communications require broader protection. After all, the private caucus is an invaluable aid to the mediator in his effort to understand the positions and desires of the parties. Indeed, if mediation is to be successful, the parties must feel sure that anything said in private caucus with the mediator is as confidential as they desire.[89] Thus, any model statute must absolutely protect mediator-party communications when the party expects the mediator to preserve confidentiality.[90] Such a statute, however, should also recognize that when a party not only uses the mediator as a confidant, but also authorizes him to convey specific information to another party, there is no heightened expectation of confidentiality with respect to that information. When a party authorizes the mediator to share with the other party particular statements made in caucus,[91] those mediator-party statements should enjoy only the more limited privilege conferred on party-party statements.[92]

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[84] A settlement agreement is a contract. *See* Village of Kaktovick v. Watt, 689 F.2d 222, 230 (D.C. Cir. 1982). The existence of such a contract can be proved, *cf.* NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 52–53 (9th Cir. 1980) (holding that, unlike a party's testimony, a mediator's testimony cannot be used to prove a failure to reduce an agreement to writing), and the contract may be challenged on the grounds of fraud, mistake, or duress, *see* First Nat'l Bank v. Pepper, 454 F.2d 626, 632 (2d Cir. 1972). Suits to rescind settlements on the ground of mistake are discouraged because the agreement itself implies doubt about the claim. *See* Universal Leaf Tobacco Co. v. American Fidelity Fire Ins. Co., 388 F. Supp. 323, 325 (D.V.I. 1974).

[85] *See, e.g.*, 29 U.S.C. § 158(d) (1982) (establishing collective bargaining obligations).

[86] *See, e.g.*, NLRB v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1981) (seeking enforcement of order to execute written contract).

[87] *See* COLO. REV. STAT. § 13-22-306(2) (Supp. 1983) (providing that a mediator is liable for "willful or wanton misconduct"); OKLA. STAT. tit. 12, § 1805(E) (Supp. 1983) (requiring "gross negligence with malicious purpose" in order to render a mediator liable for civil damages). The scope of any such duty is controversial. One commentator, for example, has strongly urged that any effort to charge a mediator with responsibility for either the substance of an agreement or the interests of outside parties would give him a stake in the outcome of the mediation process incompatible with his neutral status. *See* McCrory, *supra* note 17, at 80. These concerns counsel strict interpretation of provisions allowing suits against mediators.

[88] *See* OKLA. STAT. tit. 12, § 1805(F) (Supp. 1983).

B. Mediator Testimony and Neutrality

The decision to allow the admission into evidence of certain communications made in mediation does not determine who should be allowed to testify to them. In addition to recognizing the parties' right to maintain the confidentiality of certain communications, the law in some jurisdictions provides for a separate mediator's privilege not to testify in regard to the parties' communications.[93] Such a privilege should be recognized in order to protect the mediator's status as a neutral. In contrast to prevailing approaches, however, it should be sensitive to both the mediator's and the parties' interests in such neutrality.

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[89] *See* Kraybill, *supra* note 35 (recommended introduction to mediation session includes statement that caucus is confidential unless there is an agreement to the contrary); *see also* p. 446 & note 39 (noting protection of mediator-party communications).

[90] Tying protection to the expectation of confidentiality accords with treatment of the attorney-client privilege, under which communications made in the presence of third parties are not protected. *See* Barr Marine Prods. Co. v. Borg-Warner Corp., 84 F.R.D. 631, 634 (E.D. Pa. 1979).

[91] A prima facie showing of fraud by the communicating party would seem to demonstrate such authorization. Removal of any privilege in such a case would be consistent with the treatment of the attorney-client privilege. *See* Research Corp. v. Gourmet's Delight Mushroom Co., 560 F. Supp. 811, 813, 819–20 (E.D. Pa. 1983). The idea that "[t]he privilege takes flight if the relation is abused," Clark v. United States, 289 U.S. 1, 15 (1933) (Cardozo, J.) (dictum), should prevent abuse of mediation just as it prevents abuse of the attorney-client relationship.

[92] One court has taken such an approach in labor mediation. *See* Newark Bd. of Educ. v. Newark Teachers Union Local 481, 152 N.J. Super. 51, 61–62, 377 A.2d 765, 770–71 (App. Div. 1977) (holding that insofar as one party provided mediator with documentary counterproposals for transfer to other party, "they do not constitute 'information disclosed by a party to a mediator in the performance of his mediation function' prohibited from disclosure") (quoting N.J. ADMIN. CODE tit. 19, § 12-3.4)).

One model of a mediator's privilege may be drawn from the English common law privilege for domestic conciliation.[94] This model treats the testimonial privilege as a "joint privilege of all the parties"[95] that cannot be asserted against the wishes of the parties. Florida has apparently adopted this approach by statute,[96] and the model is consistent with the prevailing interpretation of the attorney-client privilege.[97]

An alternative model of the mediator's privilege, drawn from labor mediation,[98] conceives the privilege as a prerogative of the mediator that may be asserted regardless of the parties' wishes. According to this model, the testimonial privilege exists to protect the mediator and the mediation process,[99] not the interests of the parties. In *NLRB v. Joseph Macaluso, Inc.*,[100] for example, the Court of Appeals for the Ninth Circuit argued that the policy underlying this independent privilege in labor mediation is the preservation of "mediator effectiveness."[101] The *Macaluso* court reasoned that requiring the mediator to testify might impair his future effectiveness by destroying "the appearance of impartiality."[102]

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[93] Such a privilege is the product of either contract, *see* Simrin v. Simrin, 233 Cal. App. 2d 90, 94–95, 43 Cal. Rptr. 376, 378–79 (1965), or statute, *see* COLO. REV. STAT. § 13-22-307 (Supp. 1983); OKLA. STAT. tit. 12, § 1805(C) (Supp. 1983).

[94] *See* Pais v. Pais, 1971 P. 119, 123 (privilege belongs to the spouses, not to the counselor); McTaggart v. McTaggart, 1949 P. 94, 96–98 (C.A.); *supra* note 43.

[95] *See* LAW REFORM COMMITTEE, *supra* note 43, at 15. The committee recommended against creation of an independent privilege for mediators. *See id.* at 16–17. *But see* ROYAL COMMISSION ON MARRIAGE AND DIVORCE, REPORT 1951–1955, CMD. No. 9678, at 101 (1956) (recommending a testimonial privilege for marriage counselors).

[96] *See* FLA. STAT. ANN. § 749.01(3) (West Supp. 1983) (neglecting to recognize a mediator's privilege; providing only that communications are inadmissible "unless both parties agree otherwise"); ARK. STAT. ANN. § 81-129 (Supp. 1983) (same).

[97] *See, e.g.*, United States v. Partin, 601 F.2d 1000, 1009 (9th Cir. 1979) (privilege belongs to client, not to attorney), *cert. denied*, 446 U.S. 964 (1980); *see also* Pais v. Pais, 1971 P. 119, 123 (recognizing similarity between attorney-client and mediator's privileges; privilege is that of the client or parties, not the attorney or mediator).

[98] *See, e.g.*, N.C. GEN. STAT. § 95-36 (1981) (providing testimonial privilege for mediators); 29 C.F.R. § 1401.2(b) (1983) (same). *But see* ARK. STAT. ANN. § 81-129 (Supp. 1983) (insulating mediator from service of process only in absence of waiver of privilege by parties).

[99] *See* Speech by Daniel Dozier, Assistant General Counsel, Federal Mediation and Conciliation Service, delivered to Society of Professionals in Dispute Resolution (Oct. 1983).

[100] 618 F.2d 51 (9th Cir. 1980).

[101] *Id.* at 56.

[102] *Id.* at 55. The court noted that the administrative law judge below had based his decision upon Tomlinson of High Point, Inc., 74 N.L.R.B. 681 (1947), in which the National Labor Relations Board stated:

Although the *Macaluso* opinion recognized that the preservation of the mediator's neutrality is the central issue in any discussion of the mediator's testimonial privilege, the court treated such neutrality solely as an independent interest of the mediator. The court noted that the mediator's interest in not testifying was not tied to any party's interest in confidentiality; in fact, the testimony sought in the case did not concern privileged communications.[103] Yet the court did not have occasion to consider the possibility that the parties might have an independent interest in the mediator's neutrality, a fact that renders its analysis of the testimonial privilege incomplete.

The purpose of mediator neutrality indicates that it is as much an interest of the parties as is confidentiality itself. Unless a mediator is regarded as a neutral, the parties will refuse to participate in mediation. Parties will freely confide in the mediator only if he does not appear to be partisan or in a position to serve interests other than those of the parties.[104] Neutrality becomes an interest of the mediator only when his ability to present himself as a neutral in the future would be compromised by his present testimony.[105] Specifically, the mediator's future effectiveness will be compromised only when he must work with the parties again, or when he will later work with others who are in a position to learn of his previous testimony. Thus, because there will be situations in which a mediator need not fear an appearance of partiality that would impair his future effectiveness, adequate protection of the parties' interest in neutrality requires that either party be able to bar the mediator from testifying without the party's consent.

The effect of conceiving mediator neutrality in terms of party as well as mediator interests may be understood by considering under what circumstances the mediator should be permitted to waive or assert the privilege. First, the mediator should not be allowed to

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> However useful the testimony of a conciliator might be . . . in any given case, . . . the conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference. If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other.

Id. at 685, *quoted in* NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 55 (9th Cir. 1980); *see also* International Ass'n of Machinists v. National Mediation Bd., 425 F.2d 527, 540 (D.C. Cir. 1970); Stulberg, *supra* note 15, at 87.

[103] *Macaluso*, 618 F.2d at 56 n.3.

[104] For example, parties would not likely confide in a mediator whom they suspected might act as a policeman reporting violations of externally imposed norms. *See* W. SIMKIN, *supra* note 17, at 35.

[105] The consequence of the mediator's testifying in such cases would be the withholding of information by parties in future sessions. *Cf.* Dozier, *supra* note 99, at 4–5 (mediation process may be damaged if future participants believe it is even *possible* for a mediator to testify).

"waive" his privilege respecting confidential information without the consent of the parties.[106] To permit such unilateral disclosure would seriously lessen parties' willingness to repose trust in mediators. Indeed, proper respect for the parties' interests suggests that the mediator should not be permitted to waive his privilege even as to nonconfidential statements falling into the proposed exceptions to the privilege for party-party communications,[107] statements that either party might testify to without the other's consent.[108]

Whether the mediator will be permitted to *assert* a testimonial privilege depends on the context in which he mediates and the consequent nature of the neutrality interest at stake. Thus, in federal labor mediation — in which the mediators are visible, the parties have access to information about mediators' reputations, and mediators and parties may have to deal with each other in the future — an independent mediator's privilege would seem to be vital.[109] By contrast, in many civil mediation programs, the mediator's involvement with the parties (or their attorneys) generally does not extend beyond the resolution of the particular dispute. In such cases, a mediator need only assure the parties that he cannot be required to testify without their consent; this assurance should suffice to preserve the parties' confidence that he is not a potential adverse witness.[110]

IV. CONCLUSION

Mediation's growing prevalence as a means for resolving civil disputes has heightened the need to determine to what extent rules of privilege are necessary both to protect mediating parties' interests in free discussion and fair treatment, and to secure the parties' and the mediator's interests in preserving the mediator's neutrality.[111] To the degree that a mediation privilege is designed to preserve the integrity of the mediation process, it should have the following characteristics. First, it should protect *all* communications made in mediation, except insofar as disclosure of those communications is necessary either to enforce a mediated agreement or to prove breach of one party's obligations to another in the course of mediation. Such a statute should make clear that communications made in private caucus with the mediator are absolutely privileged unless the party authorizes the mediator to disclose a particular fact to another party; a disclosure of this sort should be treated as a communication among the parties. Second, an effective privilege statute should forbid a mediator to testify unless both parties consent; even then, the mediator's testimony should not be compelled if it would impair his future effectiveness.

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[106] The Code of Professional Conduct for Mediators directs a mediator not to waive voluntarily immunity from process without party consent. *See* CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS 4 (Colorado Council of Mediation Orgs. 1982).

[107] *See supra* pp. 452–54.

[108] The *Macaluso* court left open the question whether the director of the Federal Mediation and Conciliation Service might have permitted the mediator to testify. *See* NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 56 (9th Cir. 1980); *see also* 29 C.F.R. §1401.2(b) (1983) (granting director power to waive privilege).

[109] The importance of the privilege was made clear in National Airlines v. Air Line Pilots Ass'n, 92 L.R.R.M. (BNA) 3600 (D.D.C. 1976) (privilege upheld except under "most unusual and compelling circumstances"); *see also Macaluso*, 618 F.2d at 52 (mediator testimony disallowed despite occurrence of a "crucial fact" in his presence).

[110] The potential for a mediator who testifies without party consent to be an adverse witness was implicitly recognized in McLaughlin v. Superior Court, 140 Cal. App. 3d 473, 189 Cal. Rptr. 479, 485–87 (1983), in which the court held that a party has the right to cross-examine a mediator who supplies a recommendation to a court after unsuccessfully mediating a dispute over child custody and visitation rights under § 4607 of the California Civil Code.

[111] Of course, any privilege may be further limited when necessary to protect interests of those not privy to the mediation process. Accordingly, just as other privileges may be curtailed

These guidelines embody simple principles applicable to mediation in the wide variety of contexts in which it is rapidly being adopted. In most simple situations in which collateral duties (like the duty to

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in the face of planned criminal activity, *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1979), or child abuse, *see, e.g.*, N.Y. CIV. PRAC. LAW § 4504(b) (McKinney 1963 & Supp. 1983–1984) (creating an exception to the physician-patient privilege in order to require a doctor to report if a child is a victim of a crime), similar limits have been proposed for mediation, *see, e.g.*, CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS 3 (Colorado Council of Mediation Orgs. 1982) (exceptions to confidentiality rule). Such proposals, especially insofar as they permit or require mediators to breach confidentiality, fundamentally alter the position of the mediator in relation to the unprotected subject. *See* Dozier, *supra* note 99, at 5–6. Indeed, such proposals transform the mediator from simply a conciliator without the power to coerce into a policeman with the ability to remove the dispute from a purely private settlement process. Under these circumstances, the mediator may no longer be welcome as a neutral by the parties. *See* W. SIMKIN, *supra* note 17, at 35.

To be sure, the fact that such limits inhibit the mediation of particular disputes does not mean that they might not be desirable in order to protect a few vitally important interests. Accordingly, several methods have been proposed to limit any privilege accorded mediation. One statute suggests that limitations should be left to judicial determination on a case-by-case basis. *See* CAL. CIV. PROC. CODE § 1747 (West 1982). Alternatively, responsibility for protecting important interests of parties or nonparties might be imposed on mediators under a general "duty of care." This latter course would be analogous to the imposition of such a duty on psychiatrists. *See* Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 431, 551 P.2d 334, 340, 131 Cal. Rptr. 14, 20 (1976) (en banc). Although it would be unreasonable to expect mediators to make close judgments about, for example, dangerousness, mediators might safely be required to breach confidentiality when the failure to do so would be tantamount to a willful disregard of the safety of a party, *see* OKLA. STAT. tit. 12, § 1805(E) (Supp. 1983) (permitting suit only for "willful disregard of the rights, safety or property of any party"), or of a third person, *see* COLO. REV. STAT. § 13-22-306(2) (Supp. 1983) (imposing liability only for "willful or wanton misconduct").

Another alternative would be to limit the confidentiality of mediation by exempting particular subject matters from protection. *See, e.g.*, N.Y. CIV. PRAC. LAW § 4508 (McKinney Supp. 1983–1984) (listing exceptions to the confidentiality of communications made to a social worker); N.C. GEN. STAT. § 95-36 (1981) (exception to mediator privilege when "the commission of a crime is the subject of inquiry"). Although such a method of limitation would restrict the types of disputes capable of private resolution through mediation, it would have the advantage of clearly presenting the policy choice to be made and of being easily explicable to the parties.

bargain in good faith in labor negotiations) are unimportant, the proposed rules would allow mediators honestly to assure each participant in a mediation session that no statement will leave the room if agreement is not reached. At the same time, these rules would not shroud mediation in so much secrecy that parties signing mediated settlements would do so at their peril, having effectively waived traditional forms of judicial review of such contracts. In short, the proposed rules would make it easier and safer for parties to do what it has always been their right to do — settle their disputes outside the courthouse.

U.S. Department of Justice
Office of Information and Privacy

FOIA UPDATE

OIP Guidance

Protecting Settlement Negotiations

One of the most troubling areas of case law development under the Freedom of Information Act has been the judicial reluctance to permit protection of sensitive "settlement" information generated in connection with ongoing or potential litigation. Government agencies both generate and receive such information whenever they explore the possible settlement of legal claims with opposing parties. There exist strong policy grounds for maintaining the confidentiality of the information exchanged during the settlement negotiation process, but this necessary confidentiality has yet to be recognized under the FOIA by the courts.

Indeed, the few courts to consider the issue to date have rejected the position that the information exchanged between adversaries during settlement negotiations is entitled to distinct protection under the FOIA. In *County of Madison v. Department of Justice*, 641 F.2d 1036, 1040-41 (1st Cir. 1981), it was held that settlement proposals submitted to an agency by "past and potential adversaries" must be disclosed for lack of satisfying the "inter-agency or intra-agency" threshold requirement of Exemption 5, 5 U.S.C. §552(b)(5). *See also Norwood v. FAA*, 580 F. Supp. 994, 1002–03 (W.D. Tenn. 1984) (following *County of Madison)* (on motion for clarification and reconsideration).

In two other cases, district court judges have refused to accord settlement documents protection under Exemption 5 because of their additional conclusion that there exists no distinct "settlement negotiations" privilege. In *Center for Auto Safety v. Department of Justice*, 576 F. Supp 739, 749 (D.D.C. 1983), it was found that such a privilege had not been established by the courts in the civil discovery context, nor could one be implied directly from the special federal rule of evidence (Rule 408) prohibiting the admissibility at trial of settlement negotiation details. This conclusion was followed in *NAACP Legal Defense & Educational Fund v. Department of Justice*, 612 F. Supp. 1143, 1146 (D.D.C. 1985).

Yet what each of these adverse decisions failed to consider is that there now *does* exist a distinct "settlement negotiations" privilege, one that has been specifically recognized in a recent line of cases. In *Bottaro v. Hatton Associates*, 96 F.R.D. 158, 159–60 (E.D.N.Y. 1982), the details of a settlement were held privileged from discovery in recognition of "the strong public policy of favoring settlements" and the public interest in "insulating the bargaining table from unnecessary intrusions." This "settlement privilege," as recognized in *Bottaro*, was then applied in a subsequent case, where the details of settlement negotiations between adverse parties were held privileged from discovery "in order to safeguard the policy favoring settlements." *Olin Corp. v. Insurance Company of North America*, 603 F. Supp. 445, 449–50 (S.D.N.Y. 1985). *Cf. Chrysler Corp. v. Fedders Corp.*, Civil No. 78–Civ–3393, slip op. at 4 (S.D.N.Y. Jan. 11, 1983) (declining to apply privilege, based on incomplete evidence of its applicability to particular documents at issue).

Exemption 5 Protection

The recognition of this new privilege in these cases, especially in the absence of any civil discovery decision known to reject it, provides the basis for its full incorporation into Exemption 5 of the FOIA. As the Supreme Court has made clear on this point, "[t]he test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed" in civil discovery. *FTC v. Grolier, Inc.*, 462 U.S. 19, 26 (1983). *See also United States v. Weber Aircraft Corp.*, 104 S. Ct. 1488, 1492–94 (1984).

Moreover, protection under the FOIA of inherently sensitive settlement negotiation details is strongly compelled by the longstanding public policy favoring settlement of legal claims. As long ago as the end of the last century, the Supreme Court declared that "settlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored." *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 656 (1898). More recently, the D.C. Circuit Court of Appeals more expansively observed: "Voluntary settlement of civil controversies is in high judicial favor. . . . there is everything to be gained by encouraging methodology that facilitates compromise." *Autera v. Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969).

Indeed, the promotion of the settlement process through protection of the information exchanged during that process was expressly addressed by Justice Brennan in the *Grolier* case, in which he emphasized that all litigants, including the government, "have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes." 462 U.S. at 31 (concurring opinion). Even the First Circuit Court of Appeals in the *County of Madison* case conceded "the logic and force" of these "sound policy arguments." 641 F.2d at 1040. The fact of the matter is that only with FOIA exemption protection can the settlement process be preserved. *Cf. Center for Auto Safety v. Department of Justice*, 576 F. Supp. at 748 (agreeing that "predicament" posed by FOIA in this regard warrants remedial attention).

As to the threshold requirement of Exemption 5, only an unduly harsh application of that requirement would exclude privileged settlement documents from the exemption's protection merely because they were exchanged between a government agency and an adverse party outside of the agency. Many courts in comparable contexts have accorded this threshold requirement a "common sense interpretation" in order to "accommodate the realities" of agency functioning where necessary to safeguard valuable policy interests. *Ryan v. Department of Justice*, 617 F.2d 781, 790 & n.30 (D.C. Cir. 1980); *see also FOIA Update*, June 1982, at 10. Most dispositive on this point ought to be the Supreme Court's firm language in *Weber Aircraft*, in which it observed that the "contention that [a requester could] obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. . . . We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented." 104 S. Ct. at 1494. Any rigid, literal application of Exemption 5's threshold to settlement documents would yield the very anomaly that the Supreme Court

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has expressly recognized could not have been intended by Congress.

Exemption 4 Protection

Of course, it should not be overlooked that any settlement information submitted to an agency may qualify for protection also under Exemption 4 of the FOIA, 5 U.S.C. §552(b)(4). Surely most settlement negotiation submissions would easily meet the Exemption 4 requirement of being "commercial or financial" information, especially as the former term has been broadly construed within the context of this exemption. *See FOIA Update*, Winter 1985, at 3–4; *see also* Note, *Protecting Confidentiality in Mediation*, 98 Harv. L. Rev. 441, 451 n.77 (citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)) (Exemption 4 protects "negotiating positions or requirements in the case of labor-management mediations"). Hence, the very recognition of the information's privileged status would mean automatic protection under Exemption 4. *See, e.g., Washington Post Co. v. HHS*, 603 F. Supp. 235, 237–39 (D.D.C. 1985) (Exemption 4 protects documents covered by "confidential report" privilege) (appeal pending).

Other Protection

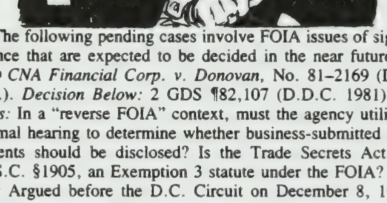
For those settlement documents that are generated within an agency, there also can be found an entirely independent basis for their protection in Exemption 2 of the FOIA, 5 U.S.C. §552(b)(2), which has been held to protect predominantly internal documents the disclosure of which would risk circumvention of law or regulation. *See Crooker v. BATF*, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc). As was noted in *Crooker*, the pertinent legislative history underlying Exemption 2 specifically supports this application: "[A]n agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the . . . settlement of cases." *Id.* at 1079 (quoting H.R. Rep. No. 1497, *supra*, at 7-8). Surely the circumvention intended to be prevented by Exemption 2 is threatened, as Justice Brennan observed in *Grolier*, whenever an agency "fac[ing] litigation of a commonly recurring type" is requested to divulge documents revealing "on what terms [those cases] may be settled." 462 U.S. at 31.

Additionally, it should not be forgotten that the types of documents routinely generated during settlement negotiations are those which may well independently qualify for protection under the more traditional privileges already expressly held to be incorporated into the FOIA's exemptions. *See, e.g., Cities Service Co. v. FTC*, Civil No. 83–812, slip op. at 11–13 (D.D.C. July 19, 1984) (attorney working papers pertaining to settlement negotiations protected under attorney work-product privilege) (appeal pending); *Murphy v. TVA*, 571 F. Supp. 502, 505–06 (D.D.C. 1983) (documents evaluating possible settlement protected under deliberative process privilege); *Fulbright & Jaworski v. Department of the Treasury*, 545 F. Supp. 615, 620 (D.D.C. 1982) (documents reflecting details of treaty negotiations protected under deliberative process privilege).

Conclusion

In sum, not only are there extremely powerful policy interests compelling the confidentiality of settlement documents, but there now exists ample legal authority for the accommodation of those interests through exemption protection under the FOIA, which the adverse cases decided to date on this difficult issue simply have failed to recognize. These few cases notwithstanding, agencies should endeavor to protect their interests in sensitive settlement documents on the basis of the exemption positions outlined above and, if these positions are advanced cogently in future cases presenting compelling factual circumstances, the case law ought to develop favorably toward such protection. Indeed, as one court has already phrased it in a comparable context, any other outcome would "seriously undermine[ ]" the negotiation process and would "defeat the public policy which favors compromise over confrontation." *Murphy v. TVA*, 571 F. Supp. at 506.

Under Advisement



The following pending cases involve FOIA issues of significance that are expected to be decided in the near future:

- *CNA Financial Corp. v. Donovan*, No. 81–2169 (D.C. Cir.). *Decision Below:* 2 GDS ¶82,107 (D.D.C. 1981). *Issues:* In a "reverse FOIA" context, must the agency utilize a formal hearing to determine whether business-submitted documents should be disclosed? Is the Trade Secrets Act, 18 U.S.C. §1905, an Exemption 3 statute under the FOIA? *Status:* Argued before the D.C. Circuit on December 8, 1981; still pending after all these years.
- *Church of Scientology v. IRS*, No. 83–1856 (D.C. Cir.). *Decision Below:* 569 F. Supp. 1165 (D.D.C. 1983). *Issue:* Does 26 U.S.C. §6103, the Internal Revenue Code provision governing access to and protection of tax information, "displace" the FOIA? *Status:* Argued before the D.C. Circuit on April 11, 1984.
- *King v. Department of Justice*, No. 84–5098 (D.C. Cir.). *Decision Below:* 586 F. Supp. 286 (D.D.C. 1983). *Issue:* Does an FBI investigation of a suspected violator of national security laws during the McCarthy Era satisfy the threshold requirements of Exemption 7? *Status:* Argued before the D.C. Circuit on December 7, 1984.
- *Brant Construction Co. v. EPA*, No. 84–2378 (7th Cir.). *Decision Below:* Civil No. H–82–596 (N.D. Ind. June 12, 1984). *Issue:* Are citizen letters to the EPA alleging wrongdoing submitted with sufficient expectations of confidentiality to be protectible under Exemption 7(D)? *Status:* Argued before the Seventh Circuit on February 27, 1985.
- *Gulf Oil Corp. v. Marshall*, No. 80–1127 (D.C. Cir.). *Decision Below:* 1 GDS ¶79,163 (D.D.C. 1979). *Issue:* Does a "reverse FOIA" action remain a "case or controversy" after the underlying FOIA request is withdrawn? *Status:* Argued before the D.C. Circuit on September 9, 1985.
- *Washington Post Co. v. Department of State*, No. 84–5604 (D.C. Cir.). *Decision Below:* Civil No. 79–2688 (D.D.C. July 3, 1984). *Issue:* Would it be a clearly unwarranted invasion of privacy to confirm whether an Iranian politician is an American citizen where confirmation would endanger his life? *Status:* Argued before the D.C. Circuit on October 1, 1985.

MCMLXIV

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
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1 CFR § 305.86-8

OFFICE OF
THE CHAIRMAN

Recommendation 86-8

Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution

Adopted December 5, 1986

The Administrative Conference has repeatedly encouraged agencies to take advantage of mediation, negotiation, minitrials, binding arbitration and other alternative means of dispute resolution ("ADR").[1] While some agencies have begun to employ these methods to reduce transaction costs and reach better results, many disputes are still being resolved with unnecessary formality, contentiousness and delay. This recommendation is aimed at helping agencies begin to explore specific avenues to expand their use of ADR services.

A key figure in the effective working of various modes of ADR, including negotiated rulemaking, is the "neutral"--a person, usually serving at the will of the parties, who generally presides and seeks to help the parties reach a resolution of their dispute. These neutrals, often highly skilled professionals with considerable training in techniques of dispute resolution, can be crucial to using ADR methods with success.[2] For agencies to use ADR effectively, they should take steps to develop routines for deciding when and how these persons can be employed, to identify qualified neutrals, and to acquire their services.

The diversity of roles played by neutrals and the uncertainty as to certain applicable legal requirements present complications for agencies considering uses of ADR. Neutrals may be specially trained and accredited, or may simply hold themselves out as having certain expertise, experience or credibility. They may be called on to make binding decisions, consistent with applicable statutory and regulatory requirements, when opposing positions cannot be reconciled, or they may simply render advice to the parties. Time may be of the essence in acquiring their services, as in many arbitrations, but in some instances may be a minor consideration. Costs of using outside neutrals may range from a few thousand dollars (for the services of a minitrial advisor) to six figures (for convening and facilitating a large-scale negotiated rulemaking). These differences render specific advice difficult to give in advance. Agencies, Congress, courts, and others who employ ADR methods or review their use should nonetheless observe certain guidelines intended to accomplish the following goals:

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[1] In Recommendation 86-3, the Conference called on agencies, where not inconsistent with statutory authority, to adopt alternatives to litigation and trial-type hearings such as mediation, minitrials, arbitration and other "ADR" methods. *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR § 305.86-3. In the rulemaking sphere, Recommendations 82-4 and 85-5 have been instrumental in promoting agency experimentation with negotiated rulemaking, which involves convening potentially interested parties to negotiate the details of a proposed rule. *Procedures for Negotiating Proposed Regulations*, 1 CFR §§ 305.82-4 and .85-5. *See also*, *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR § 305.84-4; *Resolving Disputes Under Federal Grant Programs*, 1 CFR § 305.82-2; and *Case Management as a Tool for Improving Agency Adjudication*, 1 CFR § 305.86-7.

[2] *See* the Glossary in the Appendix for brief descriptions of the roles of neutrals in various proceedings.

- **Supply.** Broadening the base of qualified, acceptable individuals or organizations, inside and outside the government, to provide ADR services.

- **Qualifications.** Insuring that neutrals have adequate skills, technical expertise, experience or other competence necessary to promote settlement, while avoiding being too exclusive in the selection process.

- **Acquisition.** Identifying existing methods, or developing new techniques, for expeditiously acquiring the services of neutrals at a reasonable cost and in a manner which (a) insures a full and open opportunity to compete and (b) enables agencies to select the most qualified person to serve as a neutral, given that the protracted nature of the government procurement process is often inconsistent with the goals of ADR and the need to avoid delays.[3]

- **Authority.** Minimizing any uncertainty under the "delegation" doctrine or similar theories that may adversely affect the authority of some neutrals to render a binding decision. This consideration, however, should not prove troublesome where neutrals merely aid the parties in reaching agreement (as in nearly all mediations, minitrials and negotiated rulemakings).

These proposals are intended to help agencies meet the challenge of reaching these goals in a time of reduced resources and in a milieu in which many affected interests may oppose change.

RECOMMENDATION

A. Availability and Qualifications of Neutrals

1. Agencies and reviewing bodies should pursue policies that will lead to an expanded, diverse supply of available neutrals, recognizing that the skills required to perform the services of a dispute resolution neutral will vary greatly depending on the nature and complexity of the issues, the ADR method employed, and the importance of the dispute. Agencies should avoid unduly limiting the pool of acceptable individuals through the use of overly restrictive qualification requirements, particularly once agencies have begun to make more regular use of ADR methods. While skill or experience in the process of resolving disputes, such as that possessed by mediators and arbitrators, is usually an important criterion in the selection of neutrals, and knowledge of the applicable statutory and regulatory schemes may at times be important, other specific qualifications should be required only when necessary for resolution of the dispute. For example:

(a) Agencies should not necessarily disqualify persons who have mediation, arbitration or judicial experience but no specific experience in the particular ADR process being pursued.

(b) While agencies should be careful not to select neutrals who have a personal or financial interest in the outcome, insisting upon "absolute neutrality"--*e.g.*, no prior affiliation with either the agency or the private industry involved--may unduly restrict the pool of available neutrals, particularly where the neutral neither renders a decision nor gives formal advice as to the outcome.

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[3] While there may be situations in which agencies can obtain the services of a qualified outside neutral without following formal procurement procedures, acquisitions of neutrals' services are generally governed by the Competition in Contracting Act, Pub. L. No. 98-369, Title VII, 98 Stat. 1175, which mandates full and open competition for contracts to supply goods and services to the federal government, and the Federal Acquisition Regulation, 48 CFR Chapter 1, Parts 1-53, which sets forth detailed procedures for conducting competitive procurements.

(c) Agencies should insist upon technical expertise in the substantive issues underlying the dispute or negotiated rulemaking only when the technical issues are so complex that the neutral could not effectively understand and communicate the parties' positions without it.

2. Agencies should take advantage of opportunities to make use of government personnel as neutrals in resolving disputes. These persons may include agency officials not otherwise involved in the dispute or employees from other agencies with appropriate skills, administrative law judges, members of boards of contract appeals, and other responsible officials. The Administrative Conference, Federal Mediation and Conciliation Service ("FMCS"), the Department of Justice (particularly the Community Relations Service ("CRS")) and other interested agencies should work to encourage imaginative efforts at sharing the services of federal "neutrals," to remove obstacles to such sharing, and to increase parties' confidence in the selection process.

3. Congress should consider providing FMCS, CRS and other appropriate agencies with funding to train their own and other agencies' personnel in the particular skills needed to serve in minitrials, negotiated rulemakings, and other ADR proceedings.

4. The Administrative Conference, in consultation with FMCS, should assist other agencies in identifying neutrals and acquiring their services and in establishing rosters of neutral advisors, arbitrators, convenors, facilitators, mediators and other experts on which federal agencies could draw when they wished. The rosters should be based, insofar as possible, on full disclosure of relevant criteria (education, experience, skills, possible bias, and the like) rather than on strict requirements of actual ADR experience or professional certification. Agencies should also consider using rosters of private groups (*e.g.*, the American Arbitration Association). The Conference, FMCS or another information center should routinely compile data identifying disputes or rulemakings in which neutrals have participated so that agencies and parties in future proceedings can be directed to sources of information pertinent to their selection of neutrals.

5. Agencies should take advantage of opportunities to expose their employees to ADR proceedings for training purposes, and otherwise encourage their employees to acquire ADR skills. Employees trained in ADR should be listed on the rosters described above, and their services made available to other agencies.

B. Acquiring Outside Neutrals' Services

1. In situations where it is necessary or desirable to acquire dispute resolution services from outside the government, agencies should explore the following methods:

(a) When authorized to employ consultants or experts on a temporary basis (e.g., 5 U.S.C. § 3109), agencies should consider utilizing that authorization in furtherance of their ADR or negotiated rulemaking endeavors.

(b) Agencies contemplating ADR or negotiated rulemaking projects involving private neutrals should, as part of their acquisition planning process pursuant to the Federal Acquisition Regulation ("FAR") Part 7,[4] periodically give notice in the *Commerce Business Daily* and in professional publications of their needs and intentions,[5] so as to allow interested organizations and individual ADR neutrals to inform the agency of their interest and qualifications.

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[4] 48 CFR Part 7.

[5] Agencies are required to give *Commerce Business Daily* notice for all contract solicitations in which the government's share is likely to exceed $10,000. 15 U.S.C. § 637(e); 48 CFR § 5.201(a). For procurements between $10,000 and $25,000 in which the agency

(c) Where speed is important and the amount of the contract is expected to be less than $25,000, agencies should use the streamlined small purchase procedures of Subpart 13.1 of the Federal Acquisition Regulation[6] in acquiring the services of outside neutrals, particularly minitrial neutral advisors, mediators and arbitrators.

(d) Agencies that foresee the need to hire private neutrals for numerous proceedings should consider the use of indefinite quantity contracts as vehicles for identifying and competitively acquiring the services of interested and qualified neutrals who can then be engaged on an expedited basis as the need arises. Agencies should, where possible, seek contracts with more than one supplier. In fashioning such indefinite quantity contracts, agencies should take care to comply with the following:

> (1) Agency contracts should specify a minimum quantity, which could be a non-nominal dollar amount rather than a minimum quantity of services.[7]
>
> (2) Negotiation of individual orders under the contract is desirable, but should generally adhere to the personnel, statements of work, and cost rates or ceilings set forth in the basic indefinite quantity contract, so as to minimize "sole source" issues.

(e) Agencies should also consider:

> (1) Entering into joint projects for acquiring neutrals' services by using other agencies' contractual vehicles.
>
> (2) Using other contracting techniques, such as basic ordering agreements and schedule contracts, where appropriate to meet their needs for neutrals' services.
>
> (3) Proposing a deviation from the FAR or amending their FAR supplements, where appropriate.

(f) Agencies should evaluate contract proposals for ADR neutrals' services on the qualifications of the offeror, but cost alone should not be the controlling factor.[8]

2. The Civilian Agency Acquisition Council and Defense Acquisition Regulatory Council should be receptive to agency or Administrative Conference proposals for deviations from,[9] or amendments to, the FAR to adapt procurement procedures to the unique requirements of ADR processes, consistent with statutory mandates.

3. In the absence of appropriate considerations suggesting a different allocation of costs, in minitrials and arbitration the parties customarily should share equally in the costs of the neutrals' services.

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reasonably expects to receive at least two offers, no such notice is required. Pub. L. No. 99-591, October 18, 1986, Title IX, Section 922.

[6] 48 CFR Subpart 13.1. This Subpart allows agencies to make purchases in amounts less than $25,000 without following all of the formalities prescribed in the FAR for ordinary procurements. If the procurement is for less than $10,000, the agency need not advertise it in advance in the *Commerce Business Daily*. 48 CFR § 5.201(a). None of these provisions relieves the agency of its mandate to obtain competition.

[7] 48 CFR § 16.504(a)(2).

[8] 48 CFR § 15.605(c).

[9] 48 CFR § 1.402.

Glossary

Mediator. A mediator is a neutral third party who attempts to assist parties in negotiating the substance of a settlement. A mediator has no authority to make any decisions that are binding on either party.

Convenor/Facilitator. Negotiated rulemakings generally proceed in two phases, one using a "convenor" and the other a "facilitator." In the first (convening) phase, a neutral called a convenor studies the regulatory issues, attempts to identify the potentially affected interests, and then advises the agency concerning the feasibility of convening representatives of these interests to negotiate a proposed rule. If the agency decides to go forward with negotiating sessions, the convenor assists in bringing the parties together. In the second (negotiating) phase, a neutral called a facilitator manages the meetings and coordinates discussions among the parties. When the parties request, a facilitator may act as a mediator, assisting the negotiators to reach consensus on the substance of a proposed rule. The roles of convenor and facilitator sometimes overlap, and often both functions are performed by the same person or persons. Neither a convenor nor a facilitator has authority to make decisions that are binding on the agency or on the participating outside parties.

Neutral Advisor. A minitrial is a structured settlement process in which each party to a dispute presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case. In this recommendation, it is presumed that the government is one party to the dispute. In some (but not all) minitrials, a neutral advisor participates by hearing the presentations of the parties and, optionally, providing further assistance in any subsequent attempt to reach a settlement. Typically, a neutral advisor is an individual selected by the parties. Duties of a neutral advisor may include presiding at the presentation, questioning witnesses, mediating settlement negotiations, and rendering an advisory opinion to the parties. In no event does a neutral advisor render a decision that is binding on any party to a minitrial.

Arbitrator. An arbitrator is a neutral third party who issues a decision on the issues in dispute after receiving evidence and hearing argument from the parties. Arbitration is a less formal alternative to adjudication or litigation, and an arbitrator's decision may or may not be binding. Arbitration may be chosen voluntarily by the parties, or it may be required by contract or statute as the exclusive dispute resolution mechanism.

ACQUIRING THE SERVICES OF NEUTRALS FOR ALTERNATIVE MEANS OF DISPUTE RESOLUTION AND NEGOTIATED RULEMAKING

Report For The Administrative
Conference Of The United States

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CROWELL & MORING
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ACQUIRING THE SERVICES OF NEUTRALS FOR ALTERNATIVE MEANS OF DISPUTE RESOLUTION AND NEGOTIATED RULEMAKING

GEORGE D. RUTTINGER

I.

INTRODUCTION

Efficient resolution of disputes involving federal agencies is often impeded by the formalities of the adjudication or the litigation process. In recent years, private parties and the federal government have been searching for ways to streamline the litigation process by developing alternative means for dispute resolution.[1] To this end, the Administrative Conference of the United States ("ACUS") has recommended that administrative agencies, where not inconsistent with statutory authority, adopt alternatives to litigation such as arbitration, mediation, and minitrials.[2] The various techniques for resolving disputes without resort to full litigation or adjudication are referred to as Alternatives Means of Disputes Resolution, or ADR.

In the sphere of administrative rulemaking, similar trends have developed. In recent years, several agencies have experimented with a technique referred to as negotiated rulemaking, which involves convening potentially interested parties to negotiate the details of a proposed rule before it is published for notice and comment in accordance with the Administrative Procedure Act.[1] ACUS has been instrumental in promoting such experimentation through its Recommendations 82-4 and 85-5, both of which are entitled "Procedures for Negotiating Proposed Regulations."[2]

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[1] See, e.g., Harter, Points On A Continuum: Dispute Resolution Procedures and the Administrative Process, Report to the Administrative Conference of the United States (June 5, 1986).

[2] ACUS Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution", 1 C.F.R. § 305.86-3.

A key figure in the effective working of ADR and negotiated rulemaking is the "neutral" who generally presides at the proceedings and attempts to assist the parties in reaching a negotiated resolution or, in the case of arbitration, issues a decision on the matter in dispute. The various types of ADR neutrals may be summarized as follows:

Minitrial Neutral Advisors. "A minitrial is a structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case."[3] In some (but not all) minitrials, a "neutral advisor" participates in the minitrial and subsequent efforts to settle the dispute. Typically, the neutral advisor is a private individual who is selected by the parties in dispute, namely the government agency and the private party or parties engaged in litigation or adjudication with the government.

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[1] *See*, Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L.J. 1 (1982).

[2] 1 C.F.R. §§ 305.82-4 and 85-5. *See also*, ACUS Recommendation 84-4, "Negotiated Cleanup of Hazardous Waste Sites Under CERCLA," 1 C.F.R. § 305.84-4.

[3] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3.

The role of the neutral advisor varies, but his duties may include presiding at the hearing, questioning witnesses, acting as a mediator during negotiations between the representatives of the litigants, and rendering an advisory opinion to the parties. In no event does the neutral advisor render a decision that is binding on either party to the minitrial.

Mediators. A mediator is simply a neutral third party who attempts to assist parties in negotiating an agreement. A mediator has no authority to make any decisions that are binding on either party.

Arbitrators. Arbitration is another form of litigation or adjudication, without some of the formal trappings. An arbitrator is a neutral third party who issues a decision on the arbitration issues after receiving evidence and hearing arguments from the parties. The arbitrator's decision may or may not be binding. Arbitration may be voluntary, in which the parties agree to resolve the issues in dispute through arbitration, or it may be mandatory, in which a statute or contract specifies arbitration as the exclusive means for resolving disputes.

Convenors-Facilitators for Negotiated Rulemakings. Negotiated rulemakings generally proceed in two phases. In the first phase, a "convenor" studies the issues presented by the proposed regulation, attempts to identify the interested parties, and then advises the agency regarding the feasibility of convening the interested parties in an attempt to negotiate a proposed regulation. If the agency decides to go forward with negotiated rulemaking, the facilitator then meets with the interested parties and attempts to mediate their differences and develop a proposed rule. Under the concept put forward by the ACUS recommendations, the proposed rule developed through this process is then published for notice and comment pursuant to Section 553 of the Administrative Procedure Act. The convenor and facilitator may be, and often is, the same person or persons. The convenor/facilitator has no authority to make any decisions that are binding on the interested parties to the negotiated rulemaking or the agency promulgating the rule.

One of the by-products of the movement toward ADR and negotiated rulemaking is the need for agencies to develop methods for identifying qualified neutrals and acquiring their services. This process involves a number of issues that will be explored in this report. Among those issues are the following:

1. Qualifications. An agency dispute or rulemaking may involve technical issues arising under a complex regulatory scheme. How can agencies insure that neutrals that are hired to promote negotiation of settlements are qualified to assist the parties in sorting through such issues? Are technical expertise and substantive knowledge required, or do generic mediation skills suffice?

2. Procurement procedures. Statutes and regulations governing procurement of services by federal agencies require competition and specify a series of procedural steps for ensuring that competition is maximized. In some cases, these procedures may be inconsistent with the agency's need for expedition in acquiring the services of an outside neutral. Are there other ways in which agencies can acquire neutrals' services expeditiously within the competitive system mandated by statute and regulation?

3. Delegation. Most neutrals lack authority to render a decision that is binding upon either the agency or

private parties. However, in the case of binding arbitration, questions continue to be raised about whether decisions delegated to executive agencies by Congress can be re-delegated to private parties for binding resolution. What are the potential "delegation" issues with respect to binding forms of ADR, particularly arbitration?

4. Long-term structural issues. The universe of neutrals who have specific experience in the experimental forms of ADR and negotiated rulemaking is presently very small. If the use of such techniques by agencies expands, how can agencies broaden the base of individuals or organizations who are available and are experienced in the arbitration/mediation/facilitation process? Should federal agencies develop a centralized roster of neutrals from which all agencies could draw? To what extent should the federal government utilize and expand the capabilities of government employees in dispute resolution?

This report will explore these and other issues, drawing heavily upon the experience of agencies to date.

II.

ESTABLISHING QUALIFICATIONS

A. Potential Criteria

The qualifications required to serve as a neutral vary depending upon the nature and complexity of the issues, the type of dispute resolution technique employed, and the size and importance of the dispute or regulation to be negotiated. In many cases, seeking an ideal combination of qualifications and experience would unduly limit the pool of individuals available to serve as neutrals. For example, only a handful of private parties have actual experience in convening or facilitating the negotiation of environmental regulations. Thus, in determining the criteria applicable to selection of a neutral, agencies will need to balance their desire for competence and experience against the need to avoid exclusivity.

There are various levels of training and experience that could be considered adequate to perform the function of a neutral in a given case:

1. *General dispute resolution experience*. Some of those contacted in connection with this report expressed the view that "mediation is mediation" -- that is, a person who has skill and experience in mediating disputes can perform the role of a neutral, regardless of the substantive issues involved. The Federal Mediation and Conciliation Service ("FMCS") has responsibility for mediating labor disputes under the Labor-Management Relations Act of 1947.[6] But FMCS labor mediators have performed a variety of other dispute resolution functions. Recently, an FMCS mediator successfully acted as convenor of a negotiated rulemaking for the Federal Aviation Administration ("FAA") in developing proposed regulations concerning flight and duty time for aircraft crews.[7]

2. *Experience in specific ADR techniques*. As noted, agency experience with ADR and negotiated rulemaking has been relatively limited to date. If the selection of neutrals is confined to persons with direct experience in these techniques, the fear of exclusivity will become a reality.

3. *Technical expertise*. There is no denying that it would be useful in arbitrating a dispute regarding licensing of a pesticide under the Federal Insecticide Fungicide and Rodenticide Act to have a degree or some formal experience in chemical engineering. Similarly, knowledge or experience in the construction industry would aid a neutral in mediating the settlement of a construction dispute. Depending upon the nature of the issues involved, it may or

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[6] 29 U.S.C. § 173.

[7] *See* Harter, *Regulatory Negotiation: The Experience So Far*, Resolve, Conservation Foundation 6-7 (Winter 1984); Perritt, *Analysis of Four Negotiated Rulemaking Efforts*, 1985 Recommendations and Reports of the Administrative Conference 637, 712-26.

may not be necessary to have such technical expertise in order to understand and communicate the conflicting positions of the disputants in a way that will promote settlement.

4. Knowledge of the statutory/regulatory scheme. Particularly in regulatory negotiation, familiarity with the legal framework in which the regulation is being developed may be an important criterion in selecting a neutral. In the arbitration setting, the Supreme Court upheld mandatory arbitration of Medicare claims by employees of private insurance carriers in part on the basis that agency regulations required such arbitrators to possess "a thorough knowledge of the Medicare program and the statutory authority and regulations upon which it is based . . . ."[1]

5. "Absolute Neutrality". Screening out potential neutrals who have a personal or financial interest in the proceeding will always be an important step in the selection process. But some agencies have gone beyond such basic conflict-of-interest considerations by insisting upon neutrals who have no past or present affiliation with any side of the controversy. Such insistence upon "absolute neutrality" could be an extremely limiting qualification, particularly since many of the persons who are most knowledgeable in a given regulatory scheme have been affiliated with either government or private industry, and sometimes both.

B. Agency Experience

1. Minitrials

a. Corps of Engineers

The agency that has had the most experience with minitrials is the U.S. Army Corps of Engineers.[2] In its Engineer Circular

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[1] Schwieker v. McClure, 456 U.S. 188, 199 (1982) (emphasis in original).

[2] See Ruttinger, Army Corps of Engineers Settles $45 Million Claim at Minitrial, Alternatives to the High Cost of Litigation, Center for Public Resources, vol. 3, no. 8 (August 1985).

No. 27-1-3, dated September 23, 1985, the Corps has set forth detailed guidelines for the use of minitrials, together with a model "Minitrial Agreement".[10] The Engineer Circular specifies that the minitrial neutral advisor "must be an impartial third party with experience in government contracting and litigation."[11] In the two minitrials that the Corps has successfully completed to date, it has used a retired judge from the United States Court of Claims and a university professor of government contracts law as neutral advisors. Corps attorneys who are responsible for the minitrial program have stated their desire, at least at the initial stages of the minitrial program, to utilize neutral advisors who have no present or past affiliation with either the government or private construction contractors. This means that in the short term, the pool of persons who have the requisite neutrality and government contracts expertise to serve as neutral advisors for Corps of Engineers minitrails will be limited.

b. Department of Justice

On June 19, 1986, the Commercial Litigation Branch of the Department of Justice issued a "Policy Concerning the Use of Mini-trials,"[12] which encouraged Branch attorneys "to assess cases assigned to them for the potential for resolution by mini-trial . . . ."[13] The Policy provides that, where appropriate, the parties may agree upon a neutral advisor to assist the management officials in resolution of the dispute. With respect to the qualifications of the neutral advisor, the Policy states as follows:

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[10] A copy of the Corps Circular, together with the model agreement, is reproduced as Appendix A to this Report.

[11] Engineer Circular No. 27-1-3 at 3.

[12] Copy of this Policy is reproduced as Appendix B to this Report.

> The neutral advisor should be a person with either legal or substantive knowledge in a relevant field. The neutral advisor should have no prior involvement in the dispute or the litigation and must possess no interest in the result of the mini-trial.[14]

c. Department of the Navy

The Department of the Navy has embarked upon the experimental use of minitrials to resolve disputes arising under Navy contracts. The Navy has expressed a preference for utilizing administrative judges from the Armed Services Board of Contract Appeals ("ASBCA") to serve as neutral advisors. The ASBCA is one of the forums designated by the Contract Disputes Act of 1978[15] to conduct hearings and render decisions on disputes arising under government contracts. However, in its first minitrial of a contract dispute, the Navy utilized the services of the same university professor of government contracting who had earlier been employed by the Corps of Engineers as a neutral advisor.

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[13] Commercial Litigation Branch Policy Concerning the Use of Mini-trials (June 19, 1986) at 1.

[14] Id. at 3.

[15] 41 U.S.C. § 601 et seq.

d. Department of Energy

The Energy Department has conducted a minitrial on a contract claim in which the neutral advisor was a former ASBCA judge who was practicing government contracts law with a private firm.[16/]

2. Negotiated Rulemakings

Neutrals for "reg neg" procedures have come from several sources. In some cases, agencies have tapped the private sector for convenors and facilitators. In other cases, government personnel, including an FMCS mediator and a staff attorney for the rulemaking agency, have performed these functions.

a. Department of Interior

In January 1986, the Department of Interior issued a Request for Proposals for convening and facilitation services for negotiated rulemaking on air quality regulations for the California Outer Continental Shelf ("OCS"). The evaluation factors for this award are detailed, and include specific ability and achievement as a facilitator, knowledge of the Outer Continental Shelf Oil and Gas Program and the Outer Continental Shelf Lands Act, understanding of the needs of the Department of Interior and other parties

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[16/] It is also possible to conduct a minitrial without utilizing a neutral advisor at all. This was done to resolve a contract dispute between the National Aeronautics and Space Administration and TRW Inc. See "Minitrial Successfully Resolves NASA-TRW Dispute," The Legal Times (September 6, 1982), p. 19.

to the rulemaking, general dispute resolution skills, and "practical knowledge of the convening/facilitating process."[17]

b. Council on Environmental Quality

In April 1986, the Executive Office of the President, on behalf of the Council on Environmental Quality ("CEQ"), issued a Request for Proposals ("RFP") for an indefinite quantity contract to supply various types of services in connection with negotiated rulemaking, including convening, facilitating, documenting, resource support, analytic support, and training. The RFP specified that the overall purpose of the contract is "to assist EPA, CEQ, and other participating agencies with joint projects in the area of regulatory negotiations."[18] In setting forth evaluation criteria for award, the solicitation states that technical proposals will be evaluated in part according to "the availability of an appropriate disciplinary mix of environmental scientists and technicians to accomplish tasks required under the scope of work."[19]

One of the successful offerors in the CEQ procurement, the Conservation Foundation, proposed a team approach in which each regulatory negotiation would be staffed by a "senior dispute resolution professional" and appropriate technical personnel selected in consultation with the agency.[10] The Foundation's proposal provided the following rationale for combining mediation and technical expertise:

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[17] Solicitation No. 3292, January 4, 1986, § M-2. Section M of the Solicitation, "Evaluation Factors for Award," is reproduced as Appendix C to this Report.

[18] Solicitation No. EOPOA-86-05, April 10, 1986, § C.2, p. 13.

[19] Id. § M.1. Section M of the Solicitation, "Evaluation Factors for Award," is reproduced as Appendix D to this Report.

> It is hard to imagine an environmental mediator being effective unless he or she has some expertise in the substance and the history of the issues at hand and, therefore, some understanding of the implications that various "process" choices have on the parties, e.g. in helping the affected interests decide how best to represent themselves, how to define the scope of issues to be negotiated, or what protocols to adopt. The stability both of the process and of a consensus agreement, if reached, is increased when the parties make these decisions in a well informed way.[11]

During negotiations leading up to contract award, the agencies (CEQ and EPA) took the position that inclusion of technical personnel on the regulatory negotiation team would not be acceptable. The rationale for the agencies' position was that while dispute resolution process skills are critical to the success of a negotiated rulemaking, technical expertise is not only unnecessary but, in some cases, counterproductive. Officials in charge of EPA's negotiated rulemaking project believe that if the negotiating group feels that it needs the assistance of a technical expert, the group itself should select that expert.

3. Summary

From the foregoing, it appears that during the experimental stages of ADR and negotiated rulemaking, agencies have sometimes opted for rather restrictive definitions of the qualifications required for neutrals. In some of the early regulatory negotiations, agencies have sought neutrals with a combination of skills that only very few individuals possess, including specific experience in facilitation of negotiated rulemakings and technical expertise in the subject matter of the rulemaking proceeding. In some cases, organizations have been able to respond to these demanding requirements through a "team approach," in which the skills of dispute resolution personnel and technical experts are combined. The agency that has the most experience in regulatory negotiation, the EPA, has consciously eschewed technical expertise as a criterion for selection of neutrals and has emphasized generic dispute resolution skills as the controlling factor.

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[10] Conservation Foundation, Technical Proposal EOPOA-86-05 -- Regulatory Negotiation Support Services, May 28, 1986, p. 7.

[11] Id.

In the case of the Corps of Engineers minitrial program, the Corps has consciously selected neutral advisors who are both "truly neutral" and expert in government contracts law applicable to the disputes. One goal of this approach is to isolate the minitrial process from political criticism at the early stages of its development. As the program progresses and the use of minitrials becomes more routine, the qualifications may be loosened, thus broadening the pool of available neutrals.

C. Qualifications Required by Government Dispute Resolution Agencies

1. Federal Mediation and Conciliation Service

The basic statutory charter of FMCS is set forth in Section 203 of the Labor-Management Relations Act of 1947:

> It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce

to settle such disputes through conciliation and mediation.[23]

FMCS employs approximately 240 mediators, stationed at 75 separate locations. The basic qualification for employment as an FMCS mediator is seven years experience in collective bargaining and/or labor-management relations. FMCS operates an intensive in-house training program for its mediators.

2. Community Relations Service

The function of the Community Relations Service ("CRS") is:

> To provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin which impair the rights of persons in such communities under the Constitution or laws of the United States or which affect or may affect interstate commerce.[24]

CRS employs a total of 60 to 70 "conciliators" in its ten regional offices. There are no specified qualifications for entry-level conciliators, and most of the training is on-the-job.

D. Rosters Maintained By Private Organizations

1. American Arbitration Association ("AAA")

The AAA maintains panels from which arbitrators may be chosen by parties who have agreed to arbitrate a dispute or disputes. The AAA has established separate panels of arbitrators for use in various types of commercial disputes. For example, for disputes arising under construction contracts, the AAA maintains a Construction Industry Panel. Members of the Construction Industry Panel are persons recommended by the National Construction Industry Arbitration Committee as "qualified to serve by virtue of their experience in the construction field."[24]

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[23] 29 U.S.C. § 173. Under the Health Care Amendments of 1974, FMCS is authorized to provide conciliation services to avert or minimize work stoppages in the health care industry. 29 U.S.C. § 183.

[24] 42 U.S.C. § 2000g-1.

Federal agencies have from time to time used the AAA as a resource in establishing arbitration programs. For example, under the terms of the Superfund Statute, disputes arising out of claims against the fund are resolved by a Board of Arbitrators appointed by the President.[25] The Act provides that each member of the Board "shall be selected through utilization of the procedures of the American Arbitration Association."[26]

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") authorizes the Environmental Protection Agency to use research data submitted by one manufacturer to register pesticides submitted by another manufacturer. The Act further provides that a manufacturer who depends upon data submitted by another firm to obtain registration must compensate that other firm, and that any disputes over the amount of compensation will be resolved through binding arbitration under the auspices of FMCS.[27] The statute requires that FMCS appoint an arbitrator from a roster of arbitrators maintained by the Service, and that the procedures and rules of the Service shall be applicable. In turn, FMCS regulations have adopted the roster of arbitrators maintained by the AAA to resolve FIFRA compensation disputes and have designated that the AAA rules and procedures shall be used.[38] The Supreme Court upheld the FIFRA arbitration provision against constitutional challenge in *Thomas v. Union Carbide Agricultural Products Co.*[39]

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[24] American Arbitration Association, Construction Industry Arbitration Rules (January 1, 1986) at 3.

[25] Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9612(4)(A).

[26] Id.

[27] FIFRA, § 3(c)(1)(D)(ii), 7 U.S.C. § 136a(C)(1)(D)(ii).

2. Center for Public Resources ("CPR")

CPR is a private non-profit organization that is devoted to promoting the use of ADR to resolve commercial disputes, as well as disputes between private parties and the government. In furtherance of this purpose, CPR maintains a list of distinguished persons who are available to serve as mediators, arbitrators, or neutral advisors in resolving disputes through ADR. The CPR roster is a blue ribbon group consisting largely of retired federal judges, former cabinet officers, and other dignitaries.

E. Conclusion

Because the substantive and procedural aspects of ADR vary significantly from case to case, it would be virtually impossible to develop a generalized set of qualifications applicable to all dispute resolution proceedings. Rather, agencies will need to take a practical approach to the selection of neutrals, balancing the demands of the specific ADR proceeding against the long-range need to develop a broader base of experienced neutrals from which to draw. While the diversity of proceedings makes specific advice hazardous, certain general guidelines can be gleaned from agency experience to date:

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[38] 29 C.F.R. § 1440.1.

[39] ___ U.S. ___, 105 S.Ct. 3325 (1985).

(1) Generic dispute resolution skills are an important prerequisite in most cases; insistence upon specific experience in the ADR process being pursued, however, many unnecessarily exclude persons whose general mediation skills are transferable to other contexts.

(2) Familiarity with the applicable statutory and regulatory scheme is generally desirable, particularly in negotiated rulemaking.

(3) Technical expertise should be required only when the substantive issues are so complex that the neutral could not effectively understand and communicate the parties' positions without in-depth technical knowledge.

(4) Avoiding conflicts of interest is important, but requiring "absolute neutrality" may unduly restrict the field of potential neutrals to retired judges or university professors.

III.

PROCUREMENT ISSUES

A. The Federal Acquisition System

In some circumstances, it may be possible for agencies to retain neutrals as experts, consultants, or special employees.[10] In most cases, however, neutrals' services must be acquired through contracting with the private individual or organization.

Federal procurement of goods and services is a highly regulated form of contracting. The principal statutes are the Armed

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[10] *See* discussion in Section III.D.4., *infra*.

Services Procurement Act,[31] which governs military procurements, and the Federal Property and Administrative Services Act of 1949,[32] which governs procurements by civilian agencies. These statutes have undergone substantial revision in recent years, principally by the Competition in Contracting Act of 1984 ("CICA").[33] CICA mandates that as a general rule, federal agencies conducting a procurement for property or services "shall obtain full and open competition through the use of competitive procedures . . . ."[34] Prior to CICA, the Armed Services Procurement Act and Federal Property and Administrative Services Act expressed a preference for formally advertised procurements, in which competitors submit sealed bids and the lowest "responsive and responsible" bidder wins the contract. The prior statutes provided that agencies could negotiate a contract rather than engage in formal advertising if one of 17 exceptions were present; one of those exceptions was contracts for "personal or professional services."[35]

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[31] 10 U.S.C. § 2201 et seq (1982), as amended by Pub. L. No. 98-369, Title VII, 98 Stat. 1175.

[32] 41 U.S.C. § 251 et seq (1982), as amended by Pub. L. No. 98-369, Title VII, 98 Stat. 1175.

[33] Pub. L. No. 98-369, Title VII, 98 Stat. 1175. Other major procurement reform statutes of recent vintage include the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, and the Defense Procurement Reform Act of 1984, Pub. L. No. 98-525.

[34] Id., § 303(a)(1).

[35] Armed Services Procurement Act, 10 U.S.C. § 2304(a)(4) (1982).

CICA mandates full and open competition in any form, whether it be by formal advertising or negotiation.[16] The Act further provides that agencies may use procedures other than competition only when one of seven specific exceptions exists. These exceptions include situations when "the property or services needed by the executive agencies are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency . . ." or "the executive agency's need for the property or services is of such an unusual and compelling urgency that the government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals . . . ."[17] Procurements under one of the seven exceptions to competition are referred to as "sole source." CICA eliminated the former exception for procurements of personal and professional services.

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[16] CICA now refers to formal advertising as "sealed bids." Under the statute, sealed bids are appropriate in the following circumstances:

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid.

41 U.S.C. § 253(a)(2)(A); 10 U.S.C. § 2304(a)(2)(A). See also, 48 C.F.R. § 6.401(a)(1)-(4).

[17] Id., § 303(c)(1) & (2).

Under the Office of Federal Procurement Policy Act,[38] both military and civilian agency procurements are governed by a unified regulatory system, the Federal Acquisition Regulation (FAR").[39] The FAR sets forth detailed procedures for conducting federal agency procurements. For any procurement over $10,000, agencies must publish a synopsis of the proposed procurement in the Commerce Business Daily ("CBD") at least 15 days in advance of issuing the solicitation.[40] After the CBD synopsis, agencies must allow at least 30 days response time for receipt of bids or proposals.[41] The agency's evaluations of bids or proposals usually takes a minimum of 30 days, although no minimum time is specified in the regulation. Thus, a competitive procurement under the procedures specified by FAR can be expected to take a minimum of two to three months.

The FAR also specifies procedures for sole source procurements -- that is, non-competitive procurements conducted under one of the seven exceptions established by CICA. In order to conduct a sole source procurement, the agency's contracting officer must provide a written justification for negotiating with only one source and must obtain the approval of his superiors in the procurement chain, at an increasingly higher level depending upon the size of the procurement.[12] The justification must contain, among other things, an identification of the statutory authority for proceeding on a basis other than full and open competition; a demonstration that "the proposed contractor's unique qualifications or the nature of the acquisition requires use of the authority cited;" a description of efforts made to ensure solicitation of offers "from as many potential sources as practicable;" and a determination that the anticipated cost of the government will be "fair and reasonable."[13] In addition, the contracting officer must conduct a "market survey" to determine whether other qualified sources capable of satisfying the government's requirement exists.[14] The written justification for a sole source procurement is public information that is available for inspection by disappointed bidders, among others.[15]

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[38] 41 U.S.C. § 405(a).

[39] 48 C.F.R., Chapter 1, Parts 1-53. Each agency has promulgated supplements to the FAR to deal with that agency's unique acquisition problems. See, e.g., DOD FAR Supplement, 48 C.F.R. Chapter 2.

[40] 48 C.F.R. § 5.201(a) and § 5.203(a). The requirement for a CBD synopsis is imposed by the Small Business Act, 15 U.S.C. § 637(c) and the Office of Federal Procurement Policy Act, 41 U.S.C. § 416.

[41] 48 C.F.R. § 5.204(b).

The competitive requirements of CICA are enforceable through a number of different actions available to disappointed bidders or offerors. An interested party who alleges a violation of a procurement statute or regulation may file a protest with the Comptroller General.[16] When such a protest is filed, the agency must suspend award or performance of the contract until the protest has been decided, unless the head of the agency finds that award or performance is warranted because of "urgent and compelling circumstances."[17] For procurements of automatic data processing equipment, such protests, with similar suspension provisions, may be filed with the General Services Board of Contract Appeals.[18] In addition, under the Federal Court Improvements Act of 1982, disappointed bidders or offerors may seek to enjoin award of a contract allegedly tainted by illegal action by filing suit in the U.S. Claims Court.[19] Traditionally, federal district courts have also entertained suits to enjoin the award or performance of federal contracts when the agency allegedly violated its mandate to promote full and open competition.[20]

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[12] 48 C.F.R. §§ 6.303-2, 6.304.

[13] 48 C.F.R. § 6.303-2(a).

[14] 48 C.F.R. §§ 6.303-2(a)(8), 7.101.

[15] 48 C.F.R. § 6.305(1).

[16] 31 U.S.C. § 3552.

B. Issues in Contracting for Neutrals' Services

The overriding requirement of free and open competition, together with the detailed acquisition procedures prescribed by the FAR, raise a number of issues when agencies seek to acquire the services of neutrals. The first and most obvious issue is time. For any procurement over $10,000, a notice of the solicitation must be placed in the CBD, the agency must wait 15 days before issuing the solicitation, and 30 days must pass before bids or offers can be received. When the time for evaluating proposals is added, the process consumes a minimum of two to three months. Practically speaking, most fully competitive negotiated procurements take several months. In the case of the competitive procurement for convening and facilitating services conducted by the Department of Interior in connection with the California Outer Continental Shelf rulemaking, the entire procurement process, from development of the terms of the solicitation through the award of the contract, took over a year.

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[17] 31 U.S.C. § 3553.

[18] 40 U.S.C. § 759(h).

[19] 28 U.S.C. § 1491(a)(3).

[20] See, Control Data Corporation v. Baldrige, 655 F.2d 283 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981); Merriam v. Kunzig, 476 F.2d 1233 (3rd Cir.), cert. denied, 414 U.S. 911 (1973); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

The protracted nature of the standard procurement process is often inconsistent with the goals of ADR and negotiated rulemaking. The very purpose of ADR is to avoid the delays inherent in the normal litigation process. Introducing several months of delay while the services of a neutral are procured could be viewed as self-defeating. Similarly, a lengthy acquisition process for the convenor or facilitator may be unacceptable when an agency is seeking to expedite the development of rules affecting the environment or health and safety.

A second problem is that, as discussed above, the requirement of "full and open competition" may be inconsistent with the agency's need to acquire the services of a neutral who meets a number of specific criteria. Particularly at the formative stages of ADR and negotiated rulemaking, there are only a handful of individuals and organizations that have the combination of specific experience in the procedure plus technical expertise in the substantive issues. To the extent such qualities are important to successful resolution of the issue, the field of available neutrals may be very limited, until further experience results a development of a broader base. In the case of neutral advisors for minitrials, the fact that the neutral is generally selected by agreement between the private party and the government may mean that there is only one "qualified source." Yet the market surveys, sole source determinations, and gamut of agency approvals required by Parts 6 and 7 of the FAR may make it difficult for an agency to proceed on a sole source basis in a timely fashion.[51]

A third issue arises with respect to the consideration of price in the evaluation of proposals. CICA mandates that the contract will be awarded to the "responsible source whose proposal was most advantageous to the United States, considering only price and the other factors included in the solicitation."[52] One of the principal purposes of full and open competition is to obtain the lowest available price for the federal government.[53] The requirement of some form of price competition may be inconsistent with the need to obtain the services of neutrals who have the requisite experience and reputation, as well as the neutrality, to gain the confidence of the parties and bring delicate negotiations to a satisfactory conclusion.[54] The FAR is at least of some help in this regard because it recognizes that price competition may not be appropriate in certain circumstances, including acquisitions of "professional services":

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[51] In addition, the Comptroller General has stated that sole source procurements under CICA will be closely scrutinized. Daniel H. Wagner Associates, Inc., B-220633, 86-1 CPD ¶ 166 (Feb. 18, 1986); WSI Corp., B-220025, 85-2 CPD ¶ 626 (Dec. 4, 1985).

[52] Pub. L. No. 98-369, § 2711(d)(4), 41 U.S.C. § 253(b)(d)(4).

[53] See Control Data Corporation v. Baldrige, supra note 50, 655 F.2d at 295.

> While the lowest price or lowest total cost to the Government is properly the deciding factor in many source selections, in certain acquisitions the Government may select the source whose proposal offers the greatest value to the Government in terms of performance and other factors. This may be the case, for example, in the acquisition of research and development or professional services, or when cost-reimbursement contracting is anticipated.[55]

Finally, some of those contacted in connection with this study expressed concern that the services of neutrals could be considered "personal services." As a general rule, the government must secure personal services through employment rather than contract. Agencies are not permitted to award personal services contracts in the absence of specific statutory authorization.[56] These restrictions do not appear to be a significant concern under the regulatory definition of "non-personal services contract":

> [A] contract in which the personnel rendering services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and

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[54] Acquisition of the services of neutrals is at least roughly parallel to procurement of architect/engineer services, which is governed by the Brooks Act. 40 U.S.C. §§ 541-44. The Brooks Act provides that "the agency head shall negotiate a contract with the *highest qualified firm* for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government." 40 U.S.C. § 544(a) (emphasis added).

[55] 48 C.F.R. § 15.605(c).

[56] 48 C.F.R. § 37.104(a), (b).

> control usually prevailing in relationships between the Government and its employees.[57]

Since neutrals by definition act independently and are subject to no one's supervision, their services can generally be regarded as "non-personal."[58]

C. Case Studies

1. Corps of Engineers Minitrials

The minitrial has several distinctive features that dictate the procurement procedures to be followed. First, a minitrial is by definition an extremely abbreviated hearing before senior executives of the two parties and the neutral advisor, if one is employed. Under the Corps' model minitrial agreement, the proceeding is scheduled to last two days, with a limited period for negotiating a settlement thereafter.[59] Second, the government and the private party to the dispute generally share the cost of the neutral advisor's services.[10] Third, the agency and the private party must agree on the selection of the neutral.

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[57] 48 C.F.R. § 37.101.

[58] See 61 Comp. Gen. 69, 72-74 (1981) (agency authorized to contract for legal services because law firm acted as an independent contractor and was not subject to agency supervision).

[59] Engineer Circular No. 27-1-3 at A-8. The first Corps minitrial required two days of hearings while the second lasted approximately three days. See Army Engineers Succeed in First Minitrial, Alternatives to the High Cost of Litigation, Center for Public Resources, vol. 3, no. 3 at 1 (March 1985); Ruttinger, Army Corps of Engineers Settles $45 Million Claim at Minitrial, Alternatives to the High Cost of Litigation, Center for Public Resources, vol. 3, no. 8 at 1 (August 1985).

Given the first two factors (the abbreviated nature of the minitrial and equal sharing of costs by the private parties), acquisition of the services of the neutral advisor should seldom if ever cost the government more than $10,000, at least at current prices. This means that some of the formalities of the procurement process can be dispensed with. Procurements under $10,000 need not be advertised in the CBD.[11] In addition, the low-dollar amount of neutral advisor acquisitions means that agencies can avail themselves of the small purchase procedures (under $25,000) of FAR Part 13.1. These procedures allow the agencies to procure on a more informal basis, such as soliciting quotations orally rather than through a formal request for proposals. The Corps used the small purchase procedures, without a CBD announcement, in acquiring the services of neutral advisors for both of its prior minitrials. The Department of the Navy used the same procedure in retaining a neutral advisor for its minitrial of a cost allowability dispute.

2. Department of Interior OCS Negotiated Rulemaking

As noted above, the Department of Interior used full competitive procedures to acquire convening/facilitating services for regulatory negotiation of environmental rules applicable to the

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[10] Engineer Circular No. 27-1-3 at A-4, ¶ 6.

[11] 48 C.F.R. § 5.201(a).

California OCS development. This involved the development and issuance of a 62-page request for proposals, which detailed the nature and scope of the services to be provided as well as the evaluation factors for award. An announcement of the solicitation was published in advance in the CBD. Seven firms submitted offers on the solicitation, followed by detailed evaluation and negotiations. Ultimately, a cost-reimbursement type contract was awarded to the Mediation Institute of Seattle, Washington.

The evaluation factors for award in the solicitation focused upon the experience and technical expertise of the offerors. Points were assigned to each of the five separate categories, comprising experience (30 points), understanding of the problem (25 points), dispute resolution skills (25 points), technical approach (10 points), and personnel staffing (10 points). No numerical weight was assigned to the cost proposal. The solicitation stated as follows:

> In evaluating proposals for a cost reimbursement type contract, estimated costs of contract performance and proposed fees will not be considered as controlling factors, since in this type of contract advance estimates of costs may not provide valid indicators of final actual costs. There is no requirement that cost reimbursement type contracts be awarded on the basis of either (a) the lowest proposed cost, (b) the lowest proposed fee, or (c) the lowest total estimated cost plus proposed fee.[62]

The solicitation went on to state that the cost proposal was required to reflect a "realistic and reasonable approach" to the contract.

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[62] Solicitation No. 3292, § M-3, pp. 66-62. See 48 C.F.R. § 15.605(d).

3. CEQ Procurement of Regulatory Negotiating Services

a. Historical Background

EPA has been one of the most active agencies in promoting regulatory negotiation. EPA has several "reg negs" in process and has used the procedure to complete two sets of regulations: nonconformance penalties under Section 206(g) of the Clean Air Act and pesticide exemptions under Section 18 of the FIFRA.[63] In the case of the nonconformance penalties rulemaking, EPA employed the services of ERM-McGlennon Associates as the convenor/facilitator.[64] In the second rulemaking, regarding pesticide exemptions, ERM-McGlennon Associates was used as the convenor, but the facilitator was an employee of EPA's Office of General Counsel. In acquiring the services of the outside convenor/facilitator, EPA utilized a basic ordering agreement, which is a form of contracting described in FAR Subpart 16.7.

b. The CEQ Procurement

In April 1986, CEQ undertook to acquire convening, facilitating and related services for use by EPA in its ongoing regulatory negotiation project, and by other agencies interested in launching similar projects. CEQ did so pursuant to its statutory role as a clearinghouse for hiring experts and consultants in furtherance of environment policy.[65] The procurement was conducted by a contracting officer for the Executive Office of the President ("EOP"). The EOP synopsized the solicitation in the CBD, and received some 200 requests for the RFP. Ultimately, however, only four organizations submitted offers.

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[63] See Perritt, Analysis of Four Negotiated Rulemaking Efforts, 1985 Recommendations and Reports of the Administrative Conference 637, 726-745.

[64] Mr. McGlennon was an experienced environmental mediator and former administrator of EPA Region 1.

The RFP solicited proposals on seven different categories of convening, facilitating, and related services.[66] The RFP contemplated the award of one or more indefinite quantity contracts for a one-year period, plus two option years. Under the terms of the RFP, the agency could have awarded separate contracts for each of the seven different types of services. In fact, one contract was awarded for six categories of services to the Conservation Foundation, a nonprofit environmental research organization, and a separate contract for the seventh category was awarded to the National Institute for Dispute Resolution ("NIDR"). While the RFP described the regulatory negotiation project as arising out of the program initiated by EPA, the terms of the RFP made clear that the services being procured were for the purpose of assisting EPA, the Office of Environmental Quality ("OEQ") and "other participating agencies" with joint projects in regulatory negotiations.

c. The Request for Proposals

Under the terms of the RFP, offerors were to propose a roster of professionals who would be available to perform the various services called for under the contract. These categories included "professional," defined as convenors, facilitators, analysts, and trainers, and "administrative personnel," defined as documentors, direct support staff, resource support staff, and management/ clerical positions. For each category and subcategory of personnel, the offeror was to propose a base period hourly rate, and rates for the first and second options under the contract. The offerors were also required to propose percentage ceiling rates for such items as fringe benefits, overhead, general and administrative expense, and profit/fee. As required by the regulations governing indefinite quantity contracts,[67] the RFP specified a minimum order quantity of $5,000 and maximum of $175,000.

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[65] 42 U.S.C. § 4343.

[66] These services included convening, facilitating, documenting, resource support, analytic support, and training.

The evaluation section of the RFP made it clear that each of the seven discrete categories of services (i.e., convening, facilitating, document support, etc.) would be evaluated separately. The EOP reserved the right to award separate contracts for each category or more than one contract for a given category. The evaluation factors were stated as follows:

> The Technical proposals will be evaluated according to the offeror's understanding of the requirements of the Solicitation and the availability of an appropriate disciplinary mix of environmental scientists and technicians to accomplish tasks required under the scope of work . . . . The Technical Proposal will also be rated as to the approach, methodology, and accuracy of Work Plan for the Benchmark Task Order.

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[67] 48 C.F.R. §16.504(a)(1).

> The Cost Proposal will be evaluated according to the relative costs set forth in the tables prepared in accordance with Section B of the RFP.[68]

The RFP contained a "benchmark task order" describing a hypothetical EPA negotiated rulemaking.[69] Each offeror was required to submit a work plan outlining the offeror's proposed approach, staffing, management plan, and schedule for this hypothetical task order.

Under the terms of the indefinite quantity contract, work is commissioned on particular regulatory negotiations through the issuance of task orders. The task order defines the scope of the work required, the estimated period of performance, and the estimated level of effort.[70] Within the time period specified in each task order (expected to be a week or two), the contractor is required to submit a proposed work plan outlining the contractor's objectives, approach, statement of work, deliverables, staffing arrangements, management plan, schedule, and cost/price assumptions.[71] The contractor is also required to submit a separate cost analysis providing a breakdown of costs and specifying the type of contract desired, i.e., firm fixed-price, cost plus fixed-fee, or labor hour. It is contemplated that the agency can negotiate with the contractor regarding each aspect of the work plan, including the personnel who are proposed. The RFP specifically states that the government reserves the right "to award the task orders in any order, or not to award."[11]

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[68] Solicitation No. EOPOA-86-05, § M.1, p. 85.

[69] The Benchmark Task Order is reproduced as Appendix E to this Report.

[70] Solicitation No. EOPOA-86-05, § H.9, p. 27.

[71] The Benchmark Task Order in the RFP states that a firm fixed-price order is anticipated.

In the eyes of the EOP, CEQ, and EPA, the principal advantage to this indefinite quantity contract is its flexibility. Rather than having to go through a fully competitive process for each and every regulatory negotiation, the EOP conducted a competitive procurement for the initial indefinite quantity contract. Under the terms of the contract, task orders can be issued and negotiated with the contractor for each separate rulemaking within a matter of weeks, thus shortening the period required to engage the services of a convenor or facilitator. By engaging groups like the Conservation Federation and National Institute for Dispute Resolution, CEQ, EPA, and other agencies have ready access to the rosters of experienced professionals that those groups have retained as employees or subcontractors.

4. Use of Government "Neutrals"

Another possibility for obtaining services of neutrals is to utilize government personnel. This has been done in at least two cases: the FAA negotiated rulemaking regarding flight and duty time for aircraft crews and the EPA's regulatory negotiation regarding pesticide exemptions. In the former case, a mediator from FMCS was employed as the convenor/facilitator; in the latter case, an employee from the EPA's Office of General Counsel was used. In addition, OSHA is now undertaking its second negotiated rulemaking with the intent of using an FMCS mediator.[71]

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[11] Solicitation No. EOPOA-86-05, § H.9, p. 28.

D. Evaluation of Techniques

1. Full Competitive Procurement

The most straightforward approach to acquiring the services of a neutral is that utilized by the Department of Interior for the California OCS rulemaking. The agency conducted an open competition for the contract in which seven offerors submitted proposals. The agency also ensured that a qualified source would be selected by specifying detailed technical evaluation factors, and making these technical factors the exclusive basis for evaluation of the proposals. By obtaining cost proposals but not making cost an evaluated factor, the agency avoided potential problems inherent in selecting a provider of professional services on the basis of cost rather than professional experience or expertise.

However, the principal disadvantage of a fully competitive procurement is the time and effort required, which in most cases make full competition impractical for an individual dispute resolution or regulatory negotiation. From start to finish, the Interior Department procurement of convening and facilitating services took over a year. The successful offeror submitted a detailed, two-volume proposal that took months to prepare and was estimated to cost several thousand dollars. Thus, while fully competitive procurements are the most desirable and compliant with statutory requirements, they may be impractical when time is of the essence.

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[71] In the past, agencies that have used FMCS mediators have paid a pro rata share of the mediator's salary through an inter-agency transfer of funds pursuant to the Economy Act, 31 U.S.C. § 1535.

2. Small Purchases

Use of the small purchase procedures provided for in FAR Subpart 13.1 should work for most procurements of neutral advisor services, and possibly in the case of small arbitrations and regulatory negotiations. As noted, in virtually all cases, contracts with minitrial neutral advisors should involve expenditure of under $10,000 by the government. Thus, no announcement in the CBD is required, and the streamlined procedures for small purchases can be utilized. In its two successful minitrials, the Corps of Engineers has contracted with the neutral advisor through a purchase order issued based upon an oral quotation. In each case, the purchase order was accompanied by a tripartite agreement among the neutral advisor, the government, and the private party to the dispute.[74]

Even for small purchases, however, agencies are required to obtain competition "to the maximum extent practicable."[75] Solicitations may be limited to one source only "if the contracting officer determines that only one source is reasonably available."[16] However, unlike the procedures specified in Parts 6 and 7 of the FAR for larger procurements, sole source purchases under the small purchase procedures do not require a written determination by the contracting officer or approvals by senior procurement officials. In the case of minitrial neutral advisors, sole source procurements should be justified on the basis of the need for prompt action to effect a settlement, the limitations on the number of qualified sources, and the fact that the selection of the neutral advisor must be approved in advance by the private party to the dispute.

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[74] A redacted copy of the Agreement for Services of Neutral Advisor utilized in one of the minitrials is reproduced in Appendix F hereto.

[75] 48 C.F.R. § 13.106(b)(1).

Similar factors may control the hiring of arbitrators and mediators -- i.e., joint selection and sharing of fees by the agency and private party to the dispute. In arbitrations or mediations of smaller disputes that take a few days to resolve, the small purchase procedures should be available for acquisition of the neutral's services.

3. Indefinite Quantity Contracts

As noted above, the indefinite quantity contract used by the CEQ to procure convening and facilitating services for the EPA and other agencies is a flexible procedure. Under the regulations, this type of contracting may be used when "the Government cannot predetermine . . . the precise quantities of supplies and services that will be required during the contract period . . . ."[17] --

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[16] Id.

[17] 48 C.F.R. § 16.504(b)(1). See generally Virden, Indefinite Delivery Contracts, Government Contractor Briefing Papers No. 78-2, Federal Publications (April 1978).

precisely the situation that may exist when an agency embarks upon a regulatory negotiation project. Full and open competition, as required by CICA and the procurement regulations, takes place in response to the RFP for the indefinite quantity contract. Once the contract has been awarded, acquisition of services for each separate regulatory negotiation is done through the task order/work plan procedure described above. The contractor can respond to each task order much more quickly than if full competitive procedures were required for each separate rulemaking.

Use of the indefinite quantity contract for this purpose raises several issues. First, the regulations specify that such contracts should be used only for "commercial or commercial-type products."[78] "Commercial product" is defined as something that is "sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices . . . ."[79] A "commercial-type product" is a commercial product that has been modified to meet some peculiar requirement of the government. A case could presumably be made that the mediation-type services provided by convenors and facilitators are also sold or traded in the commerical market. It is less clear whether such services are sold "to the general public" at "established catalog or market prices". Since the "commercial product" restriction is not mandatory, however, it should not pose an insuperable barrier to the use of indefinite quantity contracts for ADR-related services.

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[78] 48 C.F.R. § 16.504(b).

[79] 48 C.F.R. § 11.001.

Second, the regulations require that an indefinite quantity contract specify a "minimum quantity" of the item to be procured, and further that such minimum quantity must be more than a "nominal" amount.[80] This is necessary to avoid an illusory contract under which the government has no obligation to do anything in return for the contractor's agreement to fill orders.[81] In the regulatory negotiation and ADR context, it is obviously difficult to specify a minimum *quantity* of services to be procured. In a somewhat parallel context, the Court of Claims upheld an indefinite quantity contract for various categories of construction work where the "minimum quantity" specified in the contract was a payment of $5,000.[82]

Third, the task order procedure specified in the RFP allows the agency and the contractor to negotiate the terms of each individual task order, including the personnel who will be assigned to a particular project and, presumably, the cost of those services. In the typical indefinite quantity contract for a commercial product sold at a catalog price, the agency issues an order for a given quantity and the contractor fills the order at the price specified in the contract. That price was, of course, established through competition for the initial contract. In the case of the EOP/CEQ procurement of convening and facilitating services, the mix of services, the personnel supplied to provide the services, and even the cost of the services (within the ceilings specified in the contract) are subject to negotiation for each individual task order. Both the government and the contractor have the right not to go forward with the particular task order if the detailed terms of the order and work plan cannot be agreed upon. This leaves the arrangement open to the criticism that each task order is in fact a separate procurement that should be conducted on a competitive basis, rather than through a de facto "sole source" process under the indefinite quantity contract.

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[80] 48 C.F.R. § 16.504(a)(2).

[81] *See* Mason v. United States, 615 F.2d 1343, 1346 n.5 (Ct. Cl. 1980), *citing*, Willard Sutherland & Co. v. United States, 262 U.S. 489, 493 (1923).

[82] Mason v. United States, *supra* note 82. *See also*, Hemet Valley Flying Service Co. v. United States, 7 Cl. Ct. 512 (1985) (indefinite quantity contracts for flying services upheld, although contract required no minimum purchase of services, because contractor was paid a dollar amount to maintain the availability of his aircraft for government use).

A further problem in this regard may be that the service providers in each case are subcontractors to the organization that is performing the indefinite quantity contract. By allowing the agency and the contractor to negotiate the identity of the "subcontractor" for each separate task order, the indefinite quantity contract may in effect allow the agency to select a sole source for each separate regulatory negotiation without complying with the sole source justification procedures of the regulations.

These potential problems may be ameliorated by the fact that the material terms of each work plan -- including ceilings on cost and rates, identity of the service providers, and general approach and methodology -- were defined in the proposals submitted in response to the competitive RFP. So long as the parties adhere to those terms in negotiating individual task orders, sole source issues should be avoided.

In summary, the EOP/CEQ's use of indefinite quantity contracts is an imaginative application of an existing procurement techique to the peculiar needs of the regulatory negotiation setting.

4. Other Potential Acquisition Techniques

a. Basic Ordering Agreements

Prior to the CEQ indefinite quantity contract, the EPA procured convening and facilitating services for its regulatory negotiation project through basic ordering agreements under FAR Subpart 16.7. A basic ordering agreement is not itself a contract, but rather an agreement specifying a product or service to be procured, the contract clauses that will apply to future contracts, and other terms and conditions as negotiated between the government and the contractor. The agreement contemplates that orders can be issued during the term of the agreement and that each such order will become a separate contract upon acceptance by the contractor. The basic ordering agreement is also required to specify a method for pricing future orders.

The basic ordering agreement theoretically eliminates some of the formal steps required in competitively procuring services of a convenor/facilitator for each negotiated rulemaking. By entering into such an agreement with a mediation/facilitation firm, EPA was able to issue orders for services as each new regulatory negotiation arose. However, use of basic ordering agreements became less attractive when recent revisions to the FAR required that, before issuing an order under a basic ordering agreement, a federal agency must obtain competition in accordance with Part 6 of the FAR.[83] This means that each order under a basic ordering agreement is, in effect, a separate competitive procurement subject to the same procedures and requirements as would apply to a new contract. Thus, some of the gains in efficiency previously achieved by using basic ordering agreements have been diminished.

b. Blanket Purchasing Agreements

Blanket purchasing agreements, which are not contracts, are the equivalent of government charge accounts with qualified sources of supply.[84] These are used for simplifying purchasing when a wide variety of items in a broad class of goods is generally purchased, but the exact items, quantities and delivery requirements are not known in advance and can be expected to vary widely, or where an agreement may avoid the necessity of writing a large number of purchase orders.[85] Blanket purchasing agreements are small purchase procedures and cannot cumulatively exceed the dollar limitations for small purchases ($25,000). Use of a blanket purchase agreement does not justify sole source purchases.[86]

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[83] 48 C.F.R. § 16.703(d)(1).

[84] 48 C.F.R. § 13.201(a).

[85] 48 C.F.R. § 13.203-1.

[86] 48 C.F.R. § 13.204.

Such agreements do not appear to be especially useful as procedures for contracting with ADR neutrals. The dollar limitations are too low for regulatory negotiation (but could pay for individual arbitrators or minitrial neutrals), the services would not be the sort of standard, frequently purchased item contemplated by the regulations, and such an agreement is not a contract and could not be used to bind anyone to performance. Nor does the existence of a blanket purchase order remove the requirements for obtaining competition.[87]

c. Supply Schedules

The federal supply schedule program[88] provides agencies with a simplified process for acquiring commonly used supplies and services. Under a supply schedule, contractors agree to fill relatively small individual orders from agencies at price discounts normally available only with commercial volume purchases, in return for a promise by the government that certain agencies will obtain all of their requirements for the contract items by purchasing from the schedule. While one of the main purposes of the supply schedule program is to obtain this price advantage for the government, a second purpose is to provide a mechanism by which agencies can obtain goods and services for which there is a recurrent need without struggling through the rigors of the normal procurement process. The supply schedule mechanism, or the variant thereof, presents obvious possibilities for the acquisition of the services of mediators, facilitators, arbitrators, and perhaps other ADR professionals.

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[87] _See_ 48 C.F.R. § 16.703(d).

[88] FAR Subpart 38.1 specifies the salient legal characteristics of the contract device, and FAR Subpart 8.4 contains instructions for use by federal agencies in making purchases from a supply schedule. 48 C.F.R. Parts 8.4, 38.1.

A supply schedule is maintained by an administering agency. Most existing schedules are managed by the General Services Administration, but other agencies can be authorized to administer schedules.[19] A supply schedule is often a multiple award[20] contract in which all offerors who meet the criteria for inclusion are placed on the schedule. Full competition is used to select qualified suppliers through an ordinary contracting process that may be by sealed bids or by proposals and negotiation,[21] as appropriate.

One or more "mandatory" agencies are designated by the schedule administrator as being required to purchase all of their requirements for the included goods or services from schedule suppliers.[22] The designated agencies need not engage in competitive considerations,[23] but may obtain their needs by direct order from any schedule supplier. Exceptions to the mandatory purchase requirements are available, but do not provide much latitude to purchase non-schedule items. Urgent needs that cannot be filled by allowing a schedule contractor to accelerate the agreed-upon delivery terms can be obtained off-schedule.[34] If a mandatory agency finds a schedule item available from a non-schedule supplier at a lower price, then the agency can purchase off-schedule -- but only after obtaining full competition.[35]

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[19] 48 C.F.R. § 38.101(e). The GSA must authorize another agency to award a schedule contract.

[20] A single award schedule is also possible (48 C.F.R. § 38.102-1), and, in fact, is the preferred mechanism (48 C.F.R. § 8.403-1).

[21] Multiple award schedules are always negotiated. 48 C.F.R. § 38.102-2(a).

[22] 48 C.F.R. § 38.101(b).

[23] In fact, competitive procedures, such as soliciting bids from schedule suppliers, is prohibited. 48 C.F.R. § 8.404(b).

Non-mandatory agencies, while not required to purchase from the schedule, have the option to do so at the specified schedule prices.[36] A schedule contractor is not required to fill orders from the non-mandatory agencies, but he is encouraged to do so.[37] If the contractor accepts an order from an optional agency, he must comply with the pricing and delivery terms of the schedule.[38]

Where more than one supplier qualifies under a multiple award, then no supplier is entitled to make any sales under the schedule, although the mandatory agencies are still bound to obtain their requirements from schedule suppliers. This entitles a schedule supplier to some relief in the event a mandatory agency illegally purchases "off-schedule" (which may include acquiring the schedule items from another government agency[99]).

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[34] 48 C.F.R. § 8.404-1(a).

[35] 48 C.F.R. § 8.404-1(e).

[36] 48 C.F.R. § 38.101(c).

[37] 48 C.F.R. § 8.404-2(b).

[38] _Id_.

In the context of ADR services, one salient feature of ordinary supply schedules may require modification. Under current rules, a qualifying offeror must agree to deliver services on the same terms (in particular, volume pricing discount schedules) as the offeror makes available to its best commercial customers. This appears to have little meaning in the ADR services situation, although a requirement that offerors quote rates equivalent to their commercial rates, if any, may be appropriate. This particular feature reportedly has caused many desirable firms to avoid supply schedule contracts, because of the possibility that they would be required to sell at high-volume prices, whereas they might have the opportunity to fill only low-volume orders.[100]

d. Hiring Neutrals as Consultants, Experts, or "Special" Government Employees

Several statutes authorize federal agencies to obtain the services of consultants or experts, either by hiring them as federal employees on a short-term or interim basis, or by contracting for their services.[101] The most important of these laws is 5 U.S.C. § 3109, which provides, in pertinent part:

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[99] For example, the Department of Defense was held to have breached a requirements contract by ordering items covered by the contract from GSA. Inland Container v. United States, 206 Ct. Cl. 478, 512 F.2d 1073 (1975).

[100] See W. Goodrich & C. Mann, Avoid Disaster in Federal Supply Schedule Contracts, 15 Pub. Cont. L.J. 1 (1984) for a review of pitfalls facing supply schedule contractors.

> When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of one year) or intermittent services of experts or consultants or an organization thereof, including stenographic reporting services. Services procured under this section are without regard to:
>
> (1) the provisions of this title governing appointment in the competitive service;
>
> (2) chapter 51 [civil service classifications] and subchapter iii of chapter 53 [pay] of this title; and
>
> (3) section 5 of title 41 [requirements for advertising of contracts] . . . .

Section 3109 confers on those agencies that have the appropriate authorization in an organic or appropriation statute[102] the ability to employ consultants or experts without regard to civil service competitive hiring restrictions. In the context of ADR neutrals, experts are of most interest here as a consultant serves primarily "as an advisor to an officer" but "neither performs nor supervises performance of operating functions."[103]

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[101] Examples: 5 U.S.C. § 575 (Administrative Conference); 7 U.S.C. § 1642 (Department of Agriculture, rate not to exceed $50 per day); 21 U.S.C. § 1116 (Food and Drug Administration, six persons may be so employed with no time limitations); 22 U.S.C. § 290(F) (Inter-American Foundation); 29 U.S.C. § 656 (Department of Labor, contracts may be renewed annually); 33 U.S.C. § 569A (Corps of Engineers); 40 U.S.C. § 758 (General Services Administration); 49 U.S.C. § 1657(B) (Department of Transportation, pay not to exceed $100 per day).

[102] The Department of Defense Authorization, for example, have been contained in the yearly DOD appropriations acts.

Agencies can retain experts and consultants on a full-time basis for only one year, although many of the authorizing statutes allow for annual renewals. Experts and consultants can be hired on an intermittent basis -- that is, from time to time, working up to 130 days in a year -- for an indefinite period.[104] The pay is set by the employing agency, and may be up to the rate of pay for level V of the Executive Service.[105] No retirement benefits are accorded, and, unless required by other statutes, no holidays or overtime are provided for. Employees in this category are "per diem" employees, even if their tour of duty is for one year.

The employment of experts and consultants could be used by an agency with an irregular need for ADR services. Professionals could be brought on board in a short time, without the need for either a full-blown procurement or a competitive civil service placement. If a requirement for many services can be foreseen, but their timing is liable to be sporadic, then the employees could be hired on an intermittent basis, providing services from time to time as necessary.[106]

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[103] 23 Comp. Gen. 497 (1944); Federal Personnel Manual ("FPM") 304-1-2(1).

[104] FPM 304-1-2(5), (6).

[105] 5 U.S.C. § 3109. Other limitations may apply under statutes that provide specific authorization. See note 101, supra.

There are several potential impediments to hiring ADR neutrals as special government employees. These impediments may be summarized as follows:

Conflicts of Interest. Employees hired under 5 U.S.C. § 3109 are subject to all statutory prohibitions on conflicts of interest, including ethical standards, financial disclosure, and post-employment restrictions on employment.[107] To the extent that an expert or consultant becomes subject to conflict-of-interest restrictions, his professional options after serving as a neutral could be constrained. For example, a consultant employed by EPA on an intermittent basis was excluded from bidding on an EPA contract relating to her area of expertise because, at the time of the contract bidding, she was still technically an employee of EPA. This result was reached even though the consultant had not actually accepted any work for the agency for a period of time prior to bidding.[108] In a recent case, the government was enjoined from proceeding with a contract awarded to a bidder who had been an employee of the government when he bid, but who resigned prior to the award.[109]

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[106] It is possible for a professional to maintain two or more intermittent positions with different agencies. See 5 U.S.C. § 5703. The Federal Personnel Manual states that, under an exception to the general restriction against being paid for more than one position for more than 40 hours per week, "an individual is entitled to pay for services on an intermittent basis from more than one consultant or expert position, provided the pay is not received for the same hours of the same day." FPM 304-6-1.

[107] FPM 304-1-9. Temporary or interim employees who serve less than 130 days per year may qualify for treatment as a "special government employee", and thereby will not be subject to all of the prohibitions that apply to regular employees. See FPM Chapter 735.

Pay Limitations. Compensation for experts and consultants who are hired under Section 3109 is limited to the rate of pay for level V of the Executive Service. The daily rate may therefore be considerably less than a highly qualified neutral could command in the commercial market. Moreover, specific authorizing statutes for some agencies limit the compensation for temporary experts and consultants to very low levels; for example, the rate of compensation for Department of Agriculture experts is limited to $50 per day.[110] Thus, some qualified potential ADR neutrals may be unwilling to offer their services to government agencies if their compensation is limited to an arbitrarily low level.

Requirement to Follow Procurement Procedures. As noted above, hiring a neutral through Section 3109 obviates competitive civil service requirements. Section 3109 also exempts such hirings from the requirements of 41 U.S.C. § 5, which requires that all procurements of contracts for supplies or services in excess of $10,000 be publically advertised. However, the Comptroller General has held that this exemption

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[108] Matter of Enarco, Inc., B-218106, 85-1 CPD ¶ 592 (May 23, 1985).

[109] Speakman Co. v. Weinberger, (unpublished, D.D.C.), CCH Government Contracts Reports ¶ 74,539 (October 2, 1986).

[110] 7 U.S.C. § 1642.

> does not relieve an agency from the necessity of satisfying all of the other applicable requirements imposed by the Federal Property and Administrative Services Act of 1949 . . . and the Federal Procurement Regulations . . . on Government contracts for goods or nonpersonal services.[111]

Thus, it is not at all clear that hiring ADR neutrals as special government employees is any more efficient than utilizing procurement techniques discussed above.

e. Innovations in Procedures

Contracting for services for multiple proceedings (especially in the case of indefinite quantity contracts) can encounter procedural requirements in the Federal Acquisition Regulation that simply do not conform to the needs of the agencies. Subpart 1.4 of FAR contains the kernel that may provide the solution to this situation:[112]

> Unless precluded by law, executive order, or regulation, deviations from the FAR may be granted as specified in this subpart when necessary to meet the specified needs and requirements of each agency. The development and testing of new techiques and methods of acquisition should not be stifled simply because such action would require a FAR deviation. The fact that deviation authority is required should not, of itself, deter agencies in their development and testing of new techniques and acquisition methods . . . .[113]

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[111] 61 Comp. Gen. 69, 78 (1981) (citations omitted).

[112] 48 C.F.R. § 1.402.

[113] Revisions to the Federal Acquisition Regulations are prepared and issued through the coordinated action of the Civilian Agency Acquisition Council (composed of representatives of the civilian executive departments and EPA, the Small Business Administration, and the Veterans Administration) and the Defense Acquisition Regulatory Council (representatives of military departments, the Defense Logistics Agency, and NASA). 48 C.F.R. § 1.201-1. Notice and comment rulemaking

(Footnote continued)

While statutory requirements cannot be waived, the FAR itself points the way toward its own adjustment. Many specifications for contract devices, such as supply schedules and indefinite quantity contracts, were not established by statute, but rather developed over the years largely through experience and adjudication; it is these structural devices that are susceptible of modification.

5. Use of Government Neutrals

Using employees of the federal government as neutrals has several advantages. First, assuming the immediate availability of a qualified government neutral, the delays inherent in the procurement process described above may be avoided. Second, using government employees presumably spares the government the additional expense of paying outside neutrals.[114] Third, to the

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[113] (continued) is used when the revision is "significant". 48 C.F.R. § 1.501.2.

Deviations from the FAR are permitted "when necessary to meet the specific needs and requirements" of an agency, and require authorization by specified agency officials. 48 C.F.R. § 1.402. Deviations for a single contracting action require the agency head or a delegee to authorize the deviation and to furnish the FAR Secretariat with a copy of the authorization. 48 C.F.R. § 1.403. Deviations for a class of civilian contracting actions require that the appropriate agency official first consult with the Civilian Agency Acquisition Council. 48 C.F.R. § 1.404(a)(1). When an agency perceives the need for a class deviation on a permanent basis, the agency must submit a proposed FAR revision to the FAR Secretariat for consideration by the pertinent FAR Council(s). 48 C.F.R. § 1.404(a)(2). Deviations for defense agencies and NASA are subject to slightly different requirements.

[114] However, an agency may be required to compensate the FMCS, for example, for the services of one of its mediators through an inter-agency transfer of funds. See 31 U.S.C. § 1535. Some have argued that if one considers the fully allocated
(Footnote continued)

extent that the use of private parties as "neutrals" creates constitutional issues under the "delegation doctrine" (See § IV infra), those issues are presumably avoided, or at least substantially reduced, when government employees perform the neutral function. Finally, there may be a long-term advantage to the extent that as government employees become expert in acting as neutral advisors, arbitrators, or convenors/facilitators, the process of institutionalizing ADR and regulatory negotiation within the government will be enhanced.

Potential limitations on the use of government employees as neutrals are: first, private parties to disputes may not view government employees as truly neutral; and second, the most logical providers of neutral services, such as FMCS and CRS, may be inhibited by their statutory charters[115] and/or manpower limitations from providing such services on a regular basis.

E. Long-Term Structural Issues

As discussed above, use of state-of-the-art ADR techniques and regulatory negotiation by federal agencies is still in an

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[114] (continued) cost of a government employee's time, including salary and overhead, use of a government neutral may be more costly than contracting with an outsider.

[115] FMCS is authorized to conciliate labor disputes (29 U.S.C. § 173), while the CRS is charged with mediating community disputes relating to discrimination on the basis of race, color, or national origin. As in the past, FMCS or CRS could in effect loan an employee to another agency for a limited period to assist in an ADR or reg neg proceeding. See discussion in Section III.C.4 above. But the agencies' statutory charters would probably prevent them from establishing an ongoing ADR neutrals services for other federal agencies without specific congressional authorization.

experimental or formative stage. The experience of agencies is limited, and many agencies are sensitive to potential political criticism of their use of newly developed negotiation techniques.

The dilemma created by these factors is that the growth of these ADR techniques and regulatory negotiation may be limited by the shortage of experienced neutrals in the private sector; if agencies do not expand their use of such techniques, however, the pool of experienced neutrals cannot expand.

Thus, agencies must respond to the long-term need to develop a broader base of expertise upon which to draw for neutral services. Expansion of the talent pool could occur through several processes:

Less stringent criteria for selection. The Corps of Engineers has conceded that it is more sensitive about the selection of neutral advisors for its minitrials during the developmental stage, when the process is potentially subject to greater scrutiny by higher officials in the agency and/or Congress. As the program gains acceptance over time and becomes more part of the Corps' routine procedures, its visibility will be reduced. At that point, the Corps believes it may loosen its criteria for selection to broaden the base of available neutrals.

Training mechanisms. The proposal submitted by NIDR on the EOP/CEQ regulatory negotiation procurement provided that each negotiation would be staffed by at least two convening/facilitating professionals. One purpose of this staffing was to allow the senior professional to train his colleague in the process, thus giving the junior professional the experience needed to perform convening or facilitating services for future regulatory negotiations. While such a "team" approach may involve some short-term costs, it may be beneficial in the long run in developing a broader cadre of trained professionals available to the agencies.

Government neutrals. Both the FMCS and CRS were created in response to a specific need for mediation services within the government. By expanding the authority of FMCS, CRS, or other agencies, or creating a new "neutrals" service organization within the government, agencies' ability to expand their use of ADR and regulatory negotiation techniques would be enhanced.116/

Government Roster of Neutrals. Another device for expanding the availability of qualified neutrals would be to assign a single agency, such as ACUS, to maintain a roster of qualified neutrals from which other agencies could draw. Private individuals and organizations who wished to be listed on the roster would submit applications specifying educational background, experience, and techical expertise, if any. The central agency could also collect feedback on those neutrals who were actually employeed by agencies for ADR or regulatory negotiation. The establishment and maintenance of such a roster could be patterned after the Roster of Arbitrators maintained by FMCS for use in voluntary arbitrations

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116/ The National Institute for Dispute Resolution has a program for providing moderate grants to educational institutions and state governments to establish dispute resolution programs. Such "seed money" may be available to federal agencies that are interested in establishing pilot programs or policy guidelines for the use of ADR or regulatory negotiation.

of disputes arising under labor collective bargaining agreements.[117]

IV.

DELEGATION ISSUES

A recurring issue with respect to federal government use of ADR techniques is whether the functions performed by private neutrals are unconstitutional under the "delegation" doctrine.[118] "Delegation" actually encompasses a number of different constitutional concepts, including violations of due process, delegation of legislative power, and violation of the Appointments Clause.[119]

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[117] 29 C.F.R. Part 1404.

[118] See Memorandum for Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, "Administrative Conference Recommendation on Federal Agencies' Use of Alternative Dispute Resolution Techniques" (May 24, 1986).

[119] In addition, OMB Circular A-76, Performance of Commercial Activities, August 16, 1983, prohibits award of any contract "for the performance of an inherently governmental function." The Circular defines "governmental function" as follows:

> (1) The act of governing; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counterintelligence operations; and regulation of industry and commerce, including food and drugs.

Due Process. In a line of cases dating back to the Depression era, the Supreme Court struck down legislative delegations of public decisionmaking authority to private entities on the ground that such delegations violated due process.[120] In each of these cases, the principal due process objection was that the power to regulate a group of private parties was delegated to a subgroup of such parties who had an interest in the result of the regulation. For example, in Carter v. Carter Coal Company[121] the Court was reviewing the Bituminous Coal Conservation Act of 1935. The Act established a national bituminous coal commission and divided the country into districts. Within each district, the majority of producers and miners were authorized to fix maximum hours of labor and minimum wages that were binding upon all producers and miners within the district. The Supreme Court held that this was an unconstitutional violation of due process, stating as follows:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.[122]

Other infirmities in the private delegations found unconstitutional by the due process line of cases are the lack of any specified standards for decision by the private parties, and the lack of any review by a government agency or court.

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[120] Carter v. Carter Coal Company, 298 U.S. 238 (1938); Seattle Title Trust Co. v. Roberge, 226 U.S. 1 (1928); Eubank v. City of Richmond, 226 U.S. 137 (1912).

[121] 298 U.S. 238 (1935).

[122] Id., 298 U.S. at 311.

Delegation of legislative power. The principal case in this line of authority is A.L.A. Schecter Poultry Corp. v. United States.[123] Schecter struck down portions of the National Recovery Act as unconstitutional delegations of legislative power. In particular, Section 3 of the Act delegated to private parties and the President the power to enact codes of fair competition that were enforceable by injunction and punishable as crimes. The Court held that this "unfettered" delegation of legislative power was an unconstitutional violation of the separation of powers doctrine.

Appointments Clause. In this line of cases, the Court has nullified delegations of decisionmaking authority to private parties on the basis that official government functions cannot be performed by persons who were not appointed by the President with the advice and consent of the Senate pursuant to Article II, section 2, clause 2 of the Constitution. In Buckley v. Valeo[124] the Court held certain provisions of the Federal Election Campaign Act of 1971 to be unconstitutional on the basis that the majority of the voting members of the Federal Election Commission were appointed by the President pro tempore of the Senate and the Speaker of the House. The Commission had authority to make rules for carrying out the Act, to enforce the Act by bringing civil actions against violators, and to temporarily disqualify federal candidates for failing to file required reports. The Court held that the delegation of such regulatory and enforcement functions to persons not appointed by the President with the advice and consent of the Senate violated the Appointments Clause.

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[123] 295 U.S. 495, 537 (1935).

[124] 424 U.S. 1 (1976).

Under these various lines of delegation cases,[125] constitutional issues should not arise with respect to the various forms of ADR that are totally nonbinding, such as minitrials and mediation. In a minitrial, for example, the neutral advisor at most presides at the hearing and acts as a mediator between the principal negotiators. In no event does he render any kind of decision that is binding on either the private party or the government. The lack of any binding decisionmaking authority thus insolates nonbinding ADR from constitutional criticism.

Similarly, there should be no constitutional issues with respect to regulatory negotiation, as structured under the ACUS recommendations. First, the convenor/facilitator is not a decisionmaker, but rather a person who identifies the issues and the interested parties, and attempts to mediate a negotiated resolution among the parties. Second, under the ACUS recommendations, the product of the regulatory negotiation is a proposed rule that is not in any way binding upon the agency.[126] At the completion of the regulatory negotiation, the proposed regulation must be published in the Federal Register and subjected to the notice-and-comment rulemaking procedures of the Administrative Procedure Act.[127]

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[125] *See generally* Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 Ind. L.J. 650 (1975).

[126] *See* R. H. Johnson & Co. v. SEC, 198 F.2d 690 (2d Cir.), *cert. denied*, 344 U.S. 855 (1952); United Black Fund, Inc. v. Hampton, 352 F.Supp. 898 (D.D.C. 1972).

The constitutional delegation issues arise principally with respect to neutrals who have authority to issue decisions that are binding upon the parties to a dispute. This is most likely to be an issue in the case of arbitration. Again, however, if agencies follow the details of the ACUS recommendation regarding ADR, constitutional issues should be avoided.[128] Under the ACUS recommendation, resort to arbitration is a voluntary decision of the parties, unless mandated by a statute. Thus all parties consent to the arbitration proceeding. In addition, the parties have a role in the selection of the arbitrators, thus insuring that they will be neutral and disinterested. The decision of the arbitrator is subject to judicial review under the standards of the U.S. Arbitration Act.[129] Finally, the ACUS recommendation provides that arbitration is appropriate only when the norms for decision have been established by statute, precedent, or rule.[130]

Thus, the potential due process objections to delegations of decisionmaking authority to private parties should not apply to voluntary arbitration, as structured by the ACUS recommendation.

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[127] ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4, ¶¶ 13-14.

[128] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3, ¶ 4.

[129] 9 U.S.C. § 10.

[130] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3, ¶ 5(a)(2).

The fact that the interested parties consent to the procedure as a practical matter eliminates the potential for due process challenge. Moreover, the traditional due process objections (self-interest of the decisionmaker, lack of decisional norms, and lack of judicial review) are specifically addressed and resolved by the ACUS recommendation.

Finally, any doubts regarding whether binding arbitration complies with the due process clause are probably eliminated by the Supreme Court's decision in Schweiker v. McClure.[111] That case involved review of provisions of the Social Security Act establishing the Medicare program. The Act provided that any disputes regarding Medicare claims would be subject to mandatory arbitration by employees of private insurance carriers who had been retained to administer the program. Implementing regulations promulgated by the Department of Health and Human Services required that these private "hearing officers" be attorneys or other qualified individuals who (1) had the ability to conduct formal hearings; (2) generally understood of medical matters and terminology; and (3) possessed a thorough knowledge of the Medicare program, including the statute and regulations on which it is based.[112]

The Supreme Court held that this scheme complies with due process. The Court stated that there was a presumption that the hearing officers who decided Medicare claims were unbiased. Since claims were ultimately paid by the federal government, and not their private employers, the hearing officers had no personal or financial interest in the outcome of the proceedings. In addition, the requirement that hearing officers have pertinent experience and familiarity with the Medicare program minimized the risk of an erroneous decision and the probable value of additional procedural safeguards.[133] Under Schweiker, therefore, mandatory arbitration schemes are constitutional under the Due Process Clause, so long as the arbitrator are disinterested and possess adequate qualifications.[134]

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[111] 456 U.S. 188 (1982).

[112] Id., 456 U.S. at 199.

Nor should binding arbitration, as defined in the ACUS recommendation, involve unconstitutional delegation of legislative power or violation of the Appointments Clause. Recommendation 86-3 makes it clear that binding arbitration is inappropriate where the norms for decision are not established by statute, regulation, or precedent.[135] Thus, arbitrators will in no event be making policy decisions, but rather will be applying existing decisional standards to the facts of a particular dispute. Certainly, an arbitrator's award cannot be fairly analogized to the codes of fair competition that were struck down in the

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[133] Id., 456 U.S. at 198-99. See also Thomas v. Union Carbide Agricultural Products Co., ____ U.S. ____, 105 S. Ct. 3325 (1985) (Upholding binding arbitration provisions of the FIFRA).

[134] A specific statutory mandate does not appear necessary for the delegation of decisionmaking authority by an agency. See Tabor v. Joint Board for the Enrollment of Actuaries, 566 F.2d 705, 708 (D.C. Cir. 1977).

[135] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3, ¶ 5(a)(2).

Schecter Poultry case; in that case, the codes established norms for behavior by private parties that were enforceable through injunctions or criminal actions. An arbitrator's award simply resolves a fact-specific dispute between a private party and the government, or among private parties.

Finally, arbitrators do not have the authority to promulgate or enforce regulations, as did the Federal Electoral Commission in Buckley v. Valeo.[116] Thus, the Appointments Clause should not stand in the way of agencies' employing arbitration under the ACUS recommendation.

V.

CONCLUSIONS

The challenges facing federal agencies in expanding the use of ADR and regulatory negotiations include developing and refining procurement procedures that will streamline the process of hiring outside neutrals, and developing a broader base from which to draw in acquiring the services of private or government neutrals. Meeting this challenge will require that agencies be flexible in defining the qualifications required of outside neutrals, avoiding rigid requirements of technical expertise or specific ADR experience unless such qualities are essential to the success of the proceedings. Agencies would also benefit from efforts to pool information about their experience with ADR neutrals, ideally with the advice and assistance of agencies like ACUS and FMCS. Advantage should be taken of opportunities to train government personnel in ADR skills, and to utilize the expertise of existing dispute resolution services within the government. Finally, agencies should use existing procurement techniques in imaginative ways, and seek to develop new techniques, so that the services of qualified ADR neutrals can be acquired without the delays and procedural hurdles inherent in the normal competitive procurement process.

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[116] In the specific context of government contracts disputes, an issue has been raised as to whether binding arbitration would violate the requirements of the Contract Disputes Act of 1978, 41 U.S.C. § 601 *et seq*. (1982). That Act expressly authorizes agency boards of contract appeals or the U.S. Claims Court to hear and decide appeals arising out of disputes between government contractors and federal agencies. Arguably, the Contracts Disputes Act would pose a barrier to the use of arbitration in government contracts disputes unless the Act were specifically amended to permit arbitration.

Appendix F

AGREEMENT FOR SERVICES
OF NEUTRAL ADVISOR

This agreement, dated this _____ day of executed by the U. S. Army Engineer District, , on behalf of the Corps of Engineers (hereinafter referred to as "Corps"),

and

WHEREAS, on the day of the Corps, on behalf of the United States of America, and entered into Contract No. (hereinafter referred to as "Contract") for the construction of and

WHEREAS, has filed a claim with the Corps in accordance with the Contract Disputes Act of 1978 alleging that

and

WHEREAS, in a letter dated the Corps' contracting officer issued a final decision denying claim; and

WHEREAS, on appealed the Corps' final decision to the Corps of Engineers Board of Contract Appeals, where the appeal has been docketed as Eng BCA No. and

WHEREAS, the Corps has instituted an Alternative Contract Disputes Resolution Procedure known as a "Mini-Trial", which procedure provides the parties with a voluntary means of attempting to resolve disputes without the necessity of a lengthy and costly proceeding before a Board of Contract Appeals but without prejudicing such proceeding; and

WHEREAS, and the Corps have agree to submit Eng BCA No. 5128 to a "Mini-Trial" and have requested to serve as neutral advisor for the "Mini-Trial":

App. F-2

NOW, THEREFORE, the parties hereto mutually agree as follows:

1. agrees to serve as neutral advisor for the "Mini-Trial" to be held in on and to undertake those services set forth in the "Mini-Trial Agreement Between the United States Army Corps of Engineers and dated which agreement is attached hereto and incorporated herein by reference. shall be compensated for services rendered in the lump sum amount of , which sum shall include all fees and expenses incurred by by virtue of this agreement, including all travel and lodging expenses as well as time spent in preparation for the "Mini-Trial."

2. and the Corps agree to share equally the fees and expenses incurred by in connection with his services as neutral advisor, as set forth in paragraph 1, above. Payment to for services rendered will be made separately by and the Corps upon submission of an invoice to each of them in the amount of

3. further agrees to treat any information conveyed to him in connection with the "Mini-Trial" as confidential and agrees to refrain from disclosing to third parties any of the information exchanged at the Mini-Trial" or in preparation therefor.

4. The parties agree that will be disqualified as a trial witness, consultant, or expert for any party and that his advisory response will be inadmissible for any purpose in this or any other dispute under the contract.

CORPS OF ENGINEERS

By:________________ By:__________________ __________________

THE CONSTITUTIONALITY OF ARBITRATION IN FEDERAL PROGRAMS

Harold H. Bruff
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The University of Texas

April 26, 1987

This is a preliminary draft of a report for the consideration of the Administrative Conference of the United States. The views expressed are those of the author, and do not necessarily reflect those of the Conference, its committees, or staff.

Our "administrative state" evolved in order to shift decisionmaking from the constitutional branches to administrative agencies, which were to apply expert judgment through speedy and informal procedures.[1] Recently, however, increasing formality has beset the administrative process.[2] Consequently, agencies have begun experimenting with Alternative Dispute Resolution (ADR) procedures,[3] which employ private parties to resolve issues that are related to federal programs and that otherwise would be decided by executive officers or the courts.

This development reveals a third model for public decisionmaking, supplementing the traditional ones of decision by the constitutional branches themselves and delegation to agencies under the procedures of the Administrative Procedure Act[4] or other applicable statutes. Today, the legitimacy of the administrative state is generally thought to rest on the nature and strength of the relationships between the agencies and the constitutional branches.[5] Accordingly, concerns have arisen that ties to the constitutional branches become overly attenuated when private parties are authorized to determine or to apply public policies.

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[1] See generally Rabin, Federal Regulation in Historical Perspective, 38 Stan. L.Rev. 1189 (1986).

[2] ABA Comm. on Law and the Economy, Federal Regulation: Roads to Reform, Ch. 6 (1979); 4 Senate Comm. on Government Operations, Study on Federal Regulation, Delay in the Regulatory Process (1977).

[3] For a general overview of these procedures, see S. Goldberg, E. Green & F. Sander, Dispute Resolution (1985).

[4] 5 U.S.C. § 551 et seq.

In a series of recommendations, the Administrative Conference of the United States has urged the use of ADR techniques in federal programs.[6] Most ADR procedures present no serious constitutional issues because they leave final authority with government officers, although private parties influence the agency's decision. Examples include negotiated rulemaking[7] and mediation to aid settling litigation.[8] These procedures do not differ sharply enough from other avenues for private influence on public policymaking to justify constitutional distinctions, as I will explain. Alone among the recommended procedures, arbitration delegates decisionmaking to private individuals, with quite limited review by the government.[9]

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[5] Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984).

[6] See generally 1 CFR § 305.86-3.

[7] Negotiated rulemaking consists of agency-sponsored negotiation among groups interested in a contemplated regulation. The process generates a proposal which the agency issues as a notice of proposed rulemaking, initiating the usual procedure for informal rulemaking. See 1 CFR § 305.82-4 and -.85-5; see generally Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L.J. 1 (1982).

[8] 1 CFR § 305.86-3. See also id. §.84-4.

Existing law authorizes agencies to employ arbitration in a variety of contexts, which comprise three broad categories for purposes of analysis. The first is money claims by or against the government. For example, claims of Medicare beneficiaries for reimbursement of certain medical expenses are arbitrated by private insurance carriers.[10] The second is disputes between the government and its employees, including both grievances under existing law or contract[11] and the determination of future contractual relations.[12] The third is disputes between private parties that are related to program administration. Examples include claims against the

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[9] 1 CFR § 305.86-3.

[10] 42 U.S.C. § 1395u(b)(3)(C); 42 CFR § 405.801-.872.

[11] See generally Comment, Federal Sector Arbitration Under the Civil Service Reform Act of 1978, 17 U. San Diego L. Rev. 857 (1980).

[12] 5 U.S.C § 7119; 39 U.S.C. § 1207; see generally Craver, The Judicial Enforcement of Public Sector Interest Arbitration, 21 B.C. L. Rev. 557 (1980).

"Superfund" for cleanup of toxic wastes,[13] the ascertainment of employers' liability for withdrawal from pension plans that are overseen by the Pension Benefit Guaranty Corporation,[14] and the determination of compensation that a pesticide manufacturer must pay for the use of another's data in obtaining federal registration.[15]

My purpose here is to analyze the constitutional issues surrounding these arbitral schemes, and to suggest ways to structure them to minimize constitutional concerns. The constitutional issues take several forms. First, does article I forbid Congress to delegate government functions to private deciders? Second, is arbitration consistent with article II's grant of executive power to the President? Third, is it consistent with article III's grant of judicial power to the federal courts? Fourth, if these structural concerns are satisfied, are there assurances of due process?

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[13] 42 U.S.C. § 9612(b)(4); 40 CFR § 305.10-.52.

[14] 29 U.S.C. § 1381; 29 CFR § 2641.1-.13.

[15] 7 U.S.C. § 136a(c)(1)(D)(ii); 29 CFR § 1440.1.

I. A FRAME OF REFERENCE: PUBLIC PROGRAMS, PRIVATE POWER.

A. The Nature of Arbitration.

Arbitration, which was known to the common law, has always been employed in America for the resolution of some disputes.[16] In modern times, it has gained widespread use in labor relations and commercial practice.[17] Arbitral schemes seek to produce speedy and final decisions at low cost.[18] Accordingly, they share certain general characteristics, although their details vary substantially. The arbitrator, a private individual with no personal interest in the dispute, is often selected by the parties, sometimes with reference to expertise in the subject matter. Such organizations as the American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service (FMCS) maintain rosters of arbitrators and promulgate codes of ethics and procedure.[19] The standard for decision may be a contract provision or a specified body of law. Procedure is informal, with limited discovery and relaxed evidentiary strictures. The outcome is an award, perhaps accompanied by a brief recitation of the underlying facts and conclusions.

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[16] See generally Mann, The Formalization of Informal Law: Arbitration Before the American Revolution, 59 N.Y.U. L.Rev. 443 (1984).

[17] In 1984, nearly 40,000 labor, commercial, construction, and accident cases were filed with the American Arbitration Association. Meyerowitz, The Arbitration Alternative, 71 A.B.A.J. 78, 79 (1985).

[18] See generally S. Goldberg, E. Green & F. Sander, supra note 3, at 189-243.

The courts have developed a special relationship with arbitration. Until this century, hostile common law courts lent it little or no aid.[20] The courts distrusted the reliability of arbitral process and perceived a threat to their own jurisdiction.[21] Today, courts are more hospitable to an alternative forum that reduces large caseloads. Also, legislatures have endorsed arbitration and have defined its relation to the courts. The U.S. Arbitration Act[22] and its analogues in most states[23] authorize courts to enforce arbitration agreements and to review awards on very limited grounds (such as the corruption of the arbitrator and the consistency of the award with the arbitrator's authority). Modern cases often emphasize the need to honor contracts. For example, in Dean Witter Reynolds, Inc. v. Byrd,[24] the Supreme Court held that the Arbitration Act required enforcement of an agreement to arbitrate a securities dispute, although the consequence was to sever pendent claims from a suit properly in federal court. The Court thought that some potential inefficiency was a tolerable price to pay for the benefits of enforcing contracts.

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[19] See, e.g., American Arbitration Association Commercial Arbitration Rules, in R. Coulson, Business Arbitration--What You Need to Know 33-40 (3d ed. 1986); Code of Ethics for Arbitrators in Commercial Disputes, id. 141-49.

[20] See Wolaver, The Historical Background of Commercial Arbitration, 83 U. Pa. L. Rev. 132, 138 (1934).

[21] Kanowitz, Alternative Dispute Resolution and the Public Interest: The Arbitration Experience, 38 Hast. L.J. 239, 251-55 (1987). As Justice Story put it:

> arbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. . . . They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but rusticum judicium.

Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845)(No. 14,065).

Judicial deference to arbitration has important limits, however. First, courts do not allow arbitrators to determine their own jurisdiction. Under the Arbitration Act, that function is for the courts,[25] which resolve doubts in favor of arbitrability.[26] Second, the Supreme Court has held that certain statutes confer nonwaivable rights to federal court enforcement. For example, in Alexander v. Gardner-Denver Co.,[27] the Court held that a collective-bargaining agreement to arbitrate discrimination charges did not foreclose resort to a Title VII suit. Third, the preclusive effect of arbitration on later lawsuits is often either unclear or nonexistent.[28]

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[22] 9 U.S.C. §§ 1-14 (1982).

[23] These are usually based on the Uniform Arbitration Act, 7 U.L.A. 5 (1985).

[24] 470 U.S. 213 (1985).

B. Delegation to Private Parties in American Law.

Questions about the permissibility of placing governmental power in private hands occur throughout American law.[29]

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[25] See, e.g., AT &T Technologies, Inc. v. Communications Workers of America, 106 S.Ct. 1415 (1986).

[26] Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983).

[27] 415 U.S. 36 (1974).

[28] See generally Carlisle, Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?, 55 Fordham L. Rev. 63 (1986); see McDonald

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[29] For an able, comprehensive review, see Liebmann, Delegation to Private Parties in American Constitutional Law, 50 Ind. L. J. 650 (1975).

Unfortunately, analysis of "delegation to private parties" is hampered by a tendency of courts, confronting particular aspects of the phenomenon, to make broad statements that are inconsistent with both theory and practice in related contexts. Therefore, to provide a frame of reference for analysis in the context of administrative adjudication, I briefly review the major cases and survey the public/private distinction in American law.

1. The Supreme Court Cases.

The Supreme Court has sometimes considered the permissibility of delegations to private parties. The most prominent case is Carter v. Carter Coal Co.,[30] in which the Court invalidated a federal statute that allowed a majority of miners and the producers of two-thirds of the annual tonnage of coal to set maximum hours and minimum wages for the industry:[31]

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[28] v. City of West Branch, 104 S.Ct. 1799 (1984) (unappealed arbitration does not preclude civil rights litigation).

[30] 298 U.S. 238 (1936).

[31] 298 U.S. at 311.

> The power conferred upon the majority is, in . . . effect, the power to regulate the affairs of an unwilling . . . . minority. This is legislative delegation its most . . . . obnoxious form; for it is not even delegation to an . . . . official or an official body, presumptively disinterested, . . . but to private persons whose interests may be and often . . . are adverse to the interest of others in the same . . . business.

The Court stated an absolute principle condemning delegations to interested private deciders to regulate others: "in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially that of a competitor." Although its rhetoric suggested reliance on the delegation doctrine, the Court held that the statute denied due process.

The Court had earlier suggested the delegation doctrine basis, in A.L.A. Schechter Poultry Corp. v. United States.[32] While overturning the National Industrial Recovery Act's authorization to the President to approve codes of fair competition generated by industry, the Court asked:[33]

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[32] 295 U.S. 495 (1935).

[33] 295 U.S. at 537.

> But would it be seriously contended that Congress could delegate its legislative authority to trade . . . groups so as to empower them to enact the laws they deem to be wise and beneficent for . . . their trade or industries? . . . Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

The Schechter Court stressed the breadth of the field within which the President and the code drafters could roam, rather than the potential for interested private decisions to be rubber-stamped by harried bureaucrats-- although the Court was well aware that the administration of the NIRA posed the latter problems.[34]

Notwithstanding the New Deal Court's confident dicta, the path of the case law has wavered. In some earlier cases, the Court had struck down land use regulations authorizing groups of propertyowners to control some uses of their neighbors' property.[35] Yet the Court has repeatedly upheld delegations to interested private decisionmakers.[36] Distinctions offered to explain the inconsistencies have been thin to the vanishing point (for example, that a restriction is being relieved rather than imposed). There is little profit in reviewing these cases here.[37] It is enough to say that delegations to private deciders are in jeopardy if the decider has an interest in the outcome. To see why there is no broader rule that all private delegations are unconstitutional, it is necessary to widen our inquiry.

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[34] See L. Jaffe, Judicial Control of Administrative Action 61-62 (1965).

[35] Eubank v. City of Richmond, 226 U.S. 137 (1912); Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928).

2. The Public/Private Distinction.

The boundary of the public sector in American life has never been distinct.[38] Many "private law" arrangements bind persons not consenting to them. Ancient doctrines of property and contract allow private persons to make law, for example by imposing restrictive covenants on land.[39] Similarly, private groups are often authorized to exert coercive powers over others. One prominent example is the collective-bargaining agreement, by which a majority of workers in a bargaining unit select a representative who may bind them all.[40] Another is the formation of local governments by petition of some residents in a territory, against the wishes of the others.[41]

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[36] E.g., Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); Currin v. Wallace, 306 U.S. 1. 15-16 (1939); United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 577-78 (1939).

[37] See generally Liebmann, supra note 29; Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201 (1937).

[38] See generally Symposium, The Public/Private Distinction, 130 U. Pa. L. Rev. 1289 (1982).

Formally private action sometimes becomes legally public for some purposes. Thus, we struggle to define the kinds of relationships between private institutions and the state that suffice for "state action" and the invocation of constitutional restrictions. The Supreme Court has recently been unwilling to characterize private activity as state action notwithstanding substantial public financial support and close regulation;

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[39] The classic exposition of this point is by Jaffe, supra note 37.

[40] See, e.g., Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943) (under Railway Labor Act, majority of workers choose a representative; Board resolves disputes without judicial review).

[41] See generally Liebmann, supra note 29, at 672-75.

instead, the Court looks for direct coercion or encouragement of the particular decision in question.[42]

Per contra, formally public action sometimes has dominant private aspects. Statutes sometimes authorize agencies to transform private industry standards into government regulations.[43] And federal judges enforce consent agreements in public law litigation, as negotiated by private parties.[44]

A number of modern institutions are public/private hybrids. These often take the form of government corporations, such as the Tennessee Valley Authority, the Postal Service, or Amtrak.[45] The most important of these hybrids is the Federal Open Market Committee (FOMC), which forms and executes the nation's monetary policy.[46] The FOMC consists of the seven members of the Board of Governors of the Federal Reserve System, who are government officers, and five private bankers.

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[42] See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

[43] R. Dixon, Standards Development in the Private Sector (1978); Hamilton, The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health, 56 Tex. L. Rev. 1329 (1978).

[44] Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976).

[45] Tierney, Government Corporations and Managing the Public's Business, 99 Pol. Sci. Q. 73 (1984).

In Melcher v. Federal Open Market Committee,[47] a district court upheld the constitutionality of the FOMC. The court noted that the private members do not have the "decisive voice" in policymaking, because the Board of Governors holds a majority. The court also distinguished the coercive functions of government from monetary policymaking, which is executed through private market transactions.[48] Conceding the importance of monetary policy to the nation's economy, the court observed that many private institutions also have great impact. Finally, it relied partly on tradition-- monetary policy has been committed to a combination of public and private decisionmakers since the days of the Bank of the United States.[49]

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[46] See generally W. Melton, Inside The Fed, Making Monetary Policy Ch. 2 (1985).

[47] 644 F.Supp. 510 (D.D.C. 1986).

[48] 644 F.Supp. at 523 n. 26.

[49] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), which upheld the constitutionality of the Second Bank, did not discuss problems of private delegation.

Melcher is symptomatic of our lack of any satisfactory normative or positive theories of the public/private boundary.[50] Plainly, an a priori constitutional principle condemning private delegations would require wholesale rearrangements in our law and institutions. Nevertheless, some delegations are more justifiable than others-- the concerns expressed in the cases have substance. For now, we must content ourselves with the articulation of principles and controls in particular contexts, aided by the broader perspective.

C. Delegation of Adjudicative Power in Administrative Law.

The constitutionality of delegating adjudicative power to administrative agencies was established by Crowell v. Benson.[51] The context was a worker's compensation scheme for longshoremen. Congress had authorized an agency to decide claims under adjudicative procedures resembling those later codified in the Administrative Procedure Act (APA).[52] (An examiner was to conduct informal evidentiary hearings on a record.) The Court rejected a due process assault on administrative factfinding, because judicial review could assure the presence of substantial evidence for the award. Nor did article III require that the subject matter, which was within the federal judicial power, be allocated to the courts. It sufficed that reviewing courts retained power to decide issues of law. The Court did hold, however, that courts must perform independent review of issues of constitutional or jurisdictional fact going to the power of the agency in the premises, such as whether an accident had occurred on the navigable waters.

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[50] This note is sounded throughout the Symposium, supra note 38.

[51] 285 U.S. 22 (1932).

Although Crowell set the stage for modern administrative adjudication, much has happened since. First, the two limitations that the Court relied on to justify shifting article III business to agencies have eroded. Courts now defer to agency determinations of law as well as fact,[53] and the

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[52] 5 U.S.C. §§ 554-57.

[53] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); see generally Starr, Judicial Review in the Post-Chevron Era, 3 Yale J. on Reg. 283 (1986) (noting, however, the marked

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doctrines of constitutional and jurisdictional fact have fallen into desuetude.[54] Second, administrative adjudication and its surrounding doctrines have evolved in ways that merit brief summary here.

Crowell evinced two concerns that remain pertinent today, the extent of Congressional power to allocate judicial power to other entities and the fairness of adjudication performed outside court. I discuss each in detail below, and pause to introduce the latter now. Modern administrative law ensures fair adjudication partly through structure, and partly through procedure. Many agencies draw their membership from regulated groups, in stated pursuit of expertise. Typically, such an agency both investigates and adjudicates. The combination aids policymaking; problems of bias and interest, however, necessarily arise. These are dealt with partly by organizational separation of the investigative and adjudicative

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[53] inconsistency with which the Court has applied this doctrine).

[54] Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 247-63 (1985).

staffs below the level of the heads of the agency.[55] Also, the administrative law judges or their analogues usually enjoy statutory guarantees of their independence,[56] and are required to follow specified procedures designed to balance informality and accuracy.[57]

The Supreme Court has upheld this general arrangement against due process attack.[58] The Court is prepared to credit the protections flowing from separation of functions and procedural guarantees.[59] Moreover, the Court recognizes that obtaining the policymaking advantages of combined functions at the top of the agency has some cost to adjudicative neutrality.[60] Nevertheless, the Court has made

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[55] See generally Asimow, When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies, 81 Colum. L. Rev. 759 (1981).

[56] See 5 U.S.C. §§ 3105, 5372, 7521.

[57] See 5 U.S.C. §§ 554-57.

[58] Withrow v. Larkin, 421 U.S. 35 (1975)(state board of medical examiners could both investigate and decide charges against a doctor).

[59] See Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) (administrator acting as prosecutor could make
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[60] See Friedman v. Rogers, 440 U.S. 1, 18 (1979) (legislature can draw administrators from an organization
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it clear that a scheme's particular characteristics can present unacceptable dangers of bias or interest.[61]

D. An Approach to the Constitutional Issues.

At this point in the discussion, we can derive some general precepts for analysis. First, both administrative law and the private delegation cases display a basic ambivalence about the decider's neutrality-- the benefits of obtaining knowledgeable

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[59] preliminary assessment of civil penalties that could become available to the agency; administrative law judge adjudicated the penalties.)

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[60] sympathetic to the rules to be enforced); Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n, 426 U.S. 482 (1976) (school board could both negotiate with teachers and discharge them for illegal strike after negotiations failed); FTC v. Cement Institute, 333 U.S. 683 (1948) (FTC Commissioners could both testify before Congress regarding the illegality of a practice and later adjudicate the matter).

[61] For example, in Gibson v. Berryhill, 411 U.S. 564 (1973), the Court would not allow a licensing board drawn from one-half of a state's optometrists to decide whether the other half were engaged in unprofessional conduct. See also Tumey v. Ohio, 273 U.S. 510 (1927) (town mayor could not adjudicate where fines paid his salary); Ward v. Village of Monroeville, 409 U.S. 57 (1972) (Tumey controlled where fines formed a substantial part of municipal revenues).

or autonomous decisionmaking are gained at the risk of introducing unacceptable levels of bias or interest. This ambivalence also affects administrative law outside the adjudicative context, in ways that are pertinent to the analysis here. Traditional views of policymaking as the neutral and expert elaboration of the public's will have given way to theories that recognize and try to control private influences. Current theories of legislation emphasize its capacity to provide private goods for special interests;[62] controversy surrounds the extent to which courts should try to offset this tendency.[63] And administrative law has recently seen the ascendancy of an interest representation model of policymaking.[64] Here too, there are countercurrents. Some views of the administrative process emphasize the opportunity-- and the duty-- of administrators to seek their best conception of the public interest, constrained as decision may be by the reality of private pressure.[65]

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[62] See generally Aranson, Gellhorn & Robinson, A Theory of Legislative Delegation, 68 Corn. L. Rev. 1 (1982).

[63] Compare, e.g., Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223 (1986), with Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263 (1982).

[64] Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669 (1975).

To promote public-regarding policy, modern administrative law relies on simultaneously fostering and controlling the oversight activities of all three branches of government.[66] When decision is shifted from public to private hands, we lose some or all of these monitoring devices. If we can identify substitutes that will tolerably conform private decision to the public interest, a delegation should survive.

It may be that in most situations where private delegations are upheld, the courts perceive an overall congruence of interest between the private deciders and the public. Thus, in monetary policymaking the private bankers and the members of the Board of Governors share an interest in the long-run stability of the currency. Similarly, we allow self-regulation by securities exchanges or government regulation by members of professional groups because of their need to maintain public confidence. Manifestly, reliance on private interest to achieve public purposes produces imperfect results, but so do the alternatives.

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[65] Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985).

[66] *See generally* Bruff, Legislative Formality, Administrative Rationality, 63 Tex. L. Rev. 207 (1984).

We also use shared interests within groups to promote fairness when they regulate themselves. For example, a premise of collective bargaining is that workers derive net advantages from negotiating with management as a group, whatever their internal disagreements.[67] And the state bar is expected to understand the pressures that lawyers face. Here, the danger is that shared group interests will subordinate the interests held in common with the public.

The foregoing considerations suggest that arbitration can find a place in the administrative state. The central premise of arbitration, that the parties' consent to the process and practical guarantees of the decider's neutrality justify informal and final procedure, serves the important purpose of neutralizing bias. The overall similarity of arbitral and administrative processes demonstrates the extent to which their purposes are the same. Indeed, the nature of arbitration calls to mind an observation that Judge Friendly made while discussing administrative procedure: "the further the tribunal is removed from . . . any suspicion of bias, the less may be the need for other procedural safeguards."[68]

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[67] Jaffe, supra note 37, at 235.

Two principles should guide our approach to the constitutional issues. First, the optimal level of specificity for constitutional rules that organize the government is low. This is true for several reasons. The government is vast and diverse; perforce, even statutes with government-wide effect (e.g., the APA) are phrased in generalities. Moreover, prediction of the effects of rules on institutions is hazardous, even in the short run.[69] And the obstacles to altering constitutional rules are considerable, even when they are generated by the courts.

Second, deference is due to agency choice of procedure, whether the issue is statutory authorization[70] or constitutionality.[71] Whether analysis of process is

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[68] Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1279 (1975).

[69] For an illustrative account of the unanticipated effects of constitutional jurisprudence on bureaucracies and their clients, see Mashaw, The Management Side of Due Process: Some Theoretical and Litigation Notes on the

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[70] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[71] Mathews v. Eldridge, 424 U.S. 319 (1976).

characterized as policy, statutory authority, or constitutionality, the acceptability of procedure is a function of the particular issues to be decided.[72] Agencies are usually best situated to weigh the factors bearing on choice of procedure, in search of the best alternative.

Appraising the consistency of government arbitration with articles II and III of the Consitution involves separation of powers analysis. Here a fundamental distinction must be made in order to understand the cases. Separation of powers cases involving the aggrandizement of one branch at the expense of another present greater problems than those involving only a possible interference with the prerogatives of one branch.[73] In the aggrandizement cases, the Court has favored a formalist approach that reasons logically from the constitutional text and what is known about the framers' intentions.[74] The

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[69] Assurance of Accuracy, Fairness, and Timeliness in the

[69] (Continued on page 26)

[72] See Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and

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[73] Strauss, Separation of Powers in Court, A Foolish Inconsistency?, -- Corn. L. Rev. --- (forthcoming, 1987).

[74] E.g., INS v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 106 S.Ct. 3181 (1986).

consequence is to draw relatively bright lines between the functions of the branches.[75] In the interference cases, the Court has used a functional approach that inquires whether the core responsibilities of the branch in question have been impaired.[76]

There may be several reasons for the use of two doctrinal approaches. In cases involving the relations of the constitutional branches inter se, formalism offers the advantages of preserving clear lines of political accountability and of minimizing evasions of constitutional strictures.[77] In cases involving the distribution of functions within the "fourth branch" of the bureaucracy, however, the simplicities of formalism fit so badly with the complexities of administration that the Court shifts to a

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[69] Adjudication of Social Welfare Claims, 59 Corn. L. Rev. 772 (1974).

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[72] Administrative Procedure Reform, 118 U. Pa. L. Rev. 485, 536-37 (1970).

[75] See generally Bruff, On the Constitutional Status of the Administrative Agencies, 36 Am. U. L. Rev. 491 (1987).

[76] E.g., Nixon v. Administrator of General Services, 433 U.S. 425 (1977); CFTC v. Schor, 106 S. Ct. 3245 (1986).

[77] Bruff, supra note 75, at 506-09.

functional inquiry into the overall relationships between the constitutional branches and the agencies.[78] The functional test is far more permissive of diverse government structure than is formalism.

Thus, several considerations suggest that formalist analysis will prove inapposite to government arbitration. First, the aggrandizement concerns that prompt use of the approach are absent. Second, we are wise to minimize constitutional prescription in this area. And third, the need to defer to legislative or administrative choice of process suggests a constitutional test containing flexibility.

II. EXECUTIVE BRANCH SUPERVISION.

The President's constitutional powers "are not fixed, but fluctuate,"[79] depending on the context in which they are considered. His needs to supervise administration vary according to the subject matter. His claims are strongest where he has independent constitutional powers, as in foreign affairs, and weakest where individual liberties enjoy their own constitutional protection.[80] In addition, Congress may control executive oversight within limits that are presently uncertain.[81] For example, by placing some functions in independent agencies, Congress has expressed its desire that executive oversight be minimized.[82]

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[78] Strauss, supra note 5.

[79] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

It is possible for Congress to insulate a function from the oversight of all three constitutional branches in a way that hampers political accountability or allows arbitrariness. Courts often approach this question as a due process issue of the permissibility of private delegations, as I noted above. Still, there is a distinct question here that relates to executive supervision. Some functions are neither reviewable in court nor readily amenable to effective congressional oversight. Examples include foreign affairs and monetary policymaking. For such functions, the nature and extent of ties to the executive largely define the sufficiency of governmental control. Therefore, weak ties to the executive are less justifiable if oversight by the other branches is disabled, and more justifiable if it survives.

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[80] Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 495-98 (1979).

[81] See generally G. Robinson, E. Gellhorn & H. Bruff, The Administrative Process 117-31 (3d ed. 1986).

[82] Notwithstanding a current debate on the constitutional status of the independent agencies, see generally Symposium, "The Uneasy Constitutional Status of the Administrative Agencies," 36 Am. U. L. Rev. 277 (1987); Miller, Independent Agencies, 1986 Sup. Ct. Rev. 41, the Supreme Court continues to treat them as a viable part of the government. E.g., CFTC v. Schor, 106 S.Ct. 3245 (1986); see Bowsher v. Synar, 106 S.Ct. 3181, 3188 n. 4 (1986).

Agency procedure also affects presidential power. Adjudication enjoys constitutional[83] and statutory[84] protections from outside interference by anyone, including the President. In contrast, rulemaking is subject to increasingly ambitious executive management.[85]

Relationships between the executive and private deciders should fluctuate according to these variables of subject matter, government structure, and procedure. If ties of certain kinds between officers and deciders can be identified as consistent with the nature of the executive's supervisory needs for the particular context, article II concerns should be satisfied.

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[83] Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966).

[84] 5 U.S.C. § 557(d).

[85] See generally Symposium, Cost-Benefit Analysis and Agency Decision-Making: An Analysis of Executive Order No. 12,291, 23 Ariz. L. Rev. 1195 (1981).

A. The Scope of the Appointments Clause.

In Buckley v. Valeo,[86] the Supreme Court held that Congress could not appoint members of the Federal Election Commission. The Court read the appointments clause[87] to govern the selection of anyone "exercising significant authority pursuant to the laws of the United States."[88] In defining that phrase, the Court distinguished informational and investigative functions, which did not need to be performed by "Officers of the United States," from the FEC's enforcement powers, such as litigating, rulemaking, and adjudicating, which could only be performed by officers or their employees.[89]

Buckley is a rather formalist opinion with no obvious limits to its logic.[90] It can easily be read to require that all execution of the laws be kept in the hands of federal employees. Nevertheless, the Court's distinctions are surely related to the context of the case. The Court was considering whether Congress could assume the President's appointments power, not whether it could authorize or require the delegation outside the government of some functions that could be performed by the executive. The problem of congressional aggrandizement disappears when Congress allocates the appointment power elsewhere.[91] The need to prevent interference with core functions suggests an inquiry whether the President is denied a supervisory role that is necessary to his duty to oversee the execution of the laws.

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[86] 424 U.S. 1 (1976).

[87] U.S. Const., Art. II, § 2, cl. 2.

[88] 424 U.S. at 126.

[89] The Court noted that employees are "lesser functionaries subordinate to officers of the United States." Id. at 126 n.162.

[90] Bruff, supra note 75, at 500.

Thus, Buckley raises but does not resolve the question of most interest here: what relationships between an officer and a decider are necessary to satisfy concerns related to the appointments clause? A priori, the variety of possible relationships between the executive and those who actually make policy suggests the inadvisability of a constitutional rule that focuses on formal appointment or employment provisions.

This point is illustrated by Melcher, in which the district court declined to extend Buckley to condemn the composition of the Federal Open Market Committee. Seven FOMC members (the Board of Governors of the Federal Reserve System) are unquestionably "Officers of the United States." The other five are private bankers selected by the boards of directors of the regional Federal Reserve Banks.[92] The court declined to characterize the private members of the FOMC as government officers, although the Board of Governors supervises them in their other capacity as officers of the various Reserve Banks.[93] The court pointed to the absence of any clear authority for the supervision of these individuals in their role as FOMC members.

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[91] See Melcher v. Federal Open Market Committee, 644 F. Supp. 510, 520 (D.D.C. 1986) (distinguishing both Buckley and Bowsher v. Synar, 106 S. Ct. 3181 (1986), as involving "attempts to enlarge the legislative authority at the expense of that of the Executive Branch.")

This conclusion is consistent with any of three readings of Buckley. First, courts could ask only whether a decider is technically a government employee. Second, they could ask whether the decider is in substance a government employee. As Melcher illustrates, there are many possible relationships short of full-time employment. Courts could assess each one to determine whether the person is effectively under the control of an officer. Third, the courts could ask a more focused question: is the particular activity in question sufficiently controlled by an officer? This third inquiry seems the most appropriate, since it draws attention to the precise needs of the executive for a supervisory role.

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[92] The boards, in turn, are composed of two-thirds private members and one-third Board of Governors appointees.

[93] The Board of Governors approves their selection and compensation, and can dismiss them for cause. 12 U.S.C. §§ 248(f), 307, 341.

The functions that Buckley denied to congressional appointees all involve the coercion of primary conduct by government. Perhaps in that context the executive may never delegate its responsibilities. Buckley, however, distinguished investigation from enforcement for an unrelated reason, the need for Congress to investigate as an aid to legislation. Moreover, it is easy to exaggerate the differences between coercive and noncoercive governmental action. As economists are fond of reminding us, the carrot and the stick both influence behavior. Nevertheless, legal controls on government monitor coercive activities most closely.[94] Functional analysis can give some weight to the degree of coercion present in an activity, without resting decision exclusively on that factor. The diverse subject-matter of federal policymaking suggests that all should not hinge on a single characteristic.

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[94] See, e.g., Heckler v. Chaney, 105 S.Ct. 1649, 1656 (1985).

Suggestions have arisen that arbitration be employed in some enforcement contexts, such as the revocation of permits for hazardous waste facilities.[95] It should be possible to define a role for arbitration in enforcement, if certain limits are set. The executive has traditionally enjoyed wide prosecutorial discretion, because the component activities of gathering information, setting priorities, and allocating resources affect many of the agency's responsibilities and are difficult to monitor effectively from the outside.[96] Hence it would divest the executive of core functions to allow an arbitrator to decide whom to prosecute, or to decide other issues that implicate general enforcement policy.

Private neutrals could, however, play a number of other roles. First, they could influence enforcement in ways that do not formally displace executive discretion. Here, illustration is provided by ADR procedures other than arbitration. A portion of the ACUS recommendation would apply various ADR techniques to settlement of litigation, including negotiation, mediation, and "minitrials."[97] All of these techniques leave actual settlement authority in the hands of government officers. The recommendation would, however, expose settlements involving major public policy issues or third party effects to notice and comment.[98] This reminds us of the values served by exposing deciders to outside influences-- the process does not rely solely on interested parties and the ADR neutral, whose perspective may be limited, in settling cases having implications beyond their facts.

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[95] Robinson, U.S. Environmental Protection Agency Institutes Alternative Dispute Resolution in its Enforcement Program, 18 Dis. Res. News (ABA Com. on Dis. Res. 1986).

[96] See Heckler v. Chaney, 105 S.Ct. 1649, 1656 (1985); FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967).

Second, it should be permissible to arbitrate fact questions underlying an enforcement dispute. Here, efficiency gains from informal process are possible without sacrificing the executive's needs to set overall enforcement priorities and policy.

Finally, although the issue is more difficult, it should be permissible to arbitrate the application to a particular respondent of settled criteria for such sanctions as permit revocation. The executive retains control of overall policy by formulating the standards for sanctions. Still, an important aspect of prosecutorial discretion concerns law-applying-- the decision whether to compromise a charge or to take it to trial. And as I have noted, administrative law has accommodated the combination of prosecutorial and adjudicative functions in a single agency, with appropriate safeguards.[99] Nevertheless, due process values are served by reducing the potential for bias that attends the selection of sanctions by the investigating office.[100]

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[97] 1 CFR § 305.86-3, part D. Minitrials are abbreviated summaries of trial evidence, presented before principal officers of the litigants who are authorized to settle the case.

[98] At present, consent agreements are sometimes subjected to notice and comment procedures. G. Robinson, E. Gellhorn & H. Bruff, supra note 81, at 549.

Thus, government arbitration creates tension between two constitutional values, executive power and due process. We can accommodate them by retaining executive control over broad issues of policy, while allocating some functions of applying policy to private neutrals. The consequent reduction in executive power, although real, should be kept in perspective. Comparison of a private delegation with the government function it displaces should include consideration of the legal constraints on that function, to see how much discretion the executive is actually losing.

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[99] See Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) (administrator acting as prosecutor could make preliminary assessment of civil penalties that could become available to the agency; administrative law judge adjudicated the penalties.)

[100] See Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n, 426 U.S. 482 (1976) (school board could both negotiate with teachers and discharge them for illegal strike after negotiations failed). In Hortonville, provision of a neutral decider would have eliminated the need for the Court to inquire whether the facts raised a sufficient danger of bias to deny due process.

A brief look at the use of ADR techniques in rulemaking will illustrate this point. Rulemaking draws the President's supervisory role directly into question, because it concerns generalized policy.[101] Nevertheless, we subject rulemakers to various "outside" influences. The original purpose of the APA's notice and comment procedures was simply to provide affected persons an opportunity to educate the policymakers.[102] Today, administrative law pursues a more ambitious goal-- to use diverse outside pressures to encourage rulemakers to follow the public interest.[103]

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[101] Cutler & Johnson, Regulation and the Political Process, 84 Yale L.J. 1395 (1975).

[102] Nathanson, Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes, 75 Colum. L. Rev. 721, 754-55 (1975).

[103] *See generally* Office of the Chairman, Administrative Conference of the United States, A Guide to Federal Agency Rulemaking (1983).

Under the ACUS recommendation on negotiated rulemaking, private groups negotiate a proposed rule, which then undergoes the usual notice and comment process. This process does not differ sharply from the bargaining that can occur informally under notice and comment procedures.[104] Final policy decisions remain with the government.[105] Nothing in Buckley suggests that an officer may not be influenced by others, as long as he retains the power to decide.[106]

It is one thing, however, to constrain executive discretion, and another to shift decisions to private hands. The possibility of unduly sacrificing executive responsibility in favor of due process values attends the use of arbitration in any policy-laden context, such as public employee labor relations and money claims against the government. Here we must seek appropriate and effective ways for the executive to control private neutrals. If such controls are available, it should be permissible for Congress or the agencies to choose arbitration.

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[104] Moreover, modern agencies often employ private consultants in rulemaking, and may rely substantially on them in the deliberative process, as long as they do not abdicate the ultimate statutory responsibility for decision. United Steelworkers of America v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980).

[105] 1 CFR § 305.82-4: "The final responsibility for issuing the rule would remain with the agency." See Harter, supra note 7, at 109.

[106] See also Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (coal producers may propose minimum prices to agency that can approve, disapprove, or modify them).

B. Selecting Arbitrators.

The ACUS recommendations concerning voluntary or mandatory arbitration involve adjudication.[107] Here, as I will discuss, the federal courts assert a supervisory role. Nonetheless, Buckley retains some force. Even where the President's supervisory powers are limited, as with independent agencies and adjudicators, he retains his power to appoint the deciders, and a general interest in their performance.[108] Moreover, administrative adjudication is often used for policymaking;[109] to that extent, the President has a

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[107] 1 CFR § 305.86-3, parts B & C.

[108] See, e.g., J. Landis, Report on Regulatory Agencies to the President-Elect, Sen. Comm. on the Judiciary, 86th Cong., 2d Sess. 33 (Comm. Print 1960): "The congestion of the dockets of the agencies, the delays incident to the disposition of cases, the failure to evolve policies pursuant to basic statutory requirements are all a part

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[109] NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

substantial claim to overall supervision, not including intervention in a particular pending case.[110]

The ACUS recommends against arbitration in cases involving major new policies or precedents, significant third party effects, or special needs to honor existing precedent. These are cast as broad generalizations; at that level, they are unexceptionable. I discuss the last of them in connection with judicial power; for the others, discretion should be exercised within rather than outside the government. All three constitutional branches have oversight claims. And affected third parties, who have not consented to the use of private deciders, are entitled to the protections that administrative law and government structure provide. Still, it is necessary to guard against overgenerality. Adjudication often has visible effects beyond the parties. Within limits, the presence of such effects should not rule out arbitration.

Under the recommendations, agencies usually control whether to resort to arbitration. Mandatory arbitration is suggested

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[108] of the President's constitutional concern to see that the laws are faithfully executed."

[110] See ABA Comm. on Law and the Economy, supra note 2, at 79, 82.

only for controversies between private parties, not those involving the government as a party. The need for executive choice of process is weak when the government is acting only as arbiter of disputes between citizens. Where the government's own interests are at stake, voluntary arbitration allows agencies to choose the use of a private neutral, either before or after controversy arises. For example, if an officer is authorized to settle claims, efficiency gains can result from referring some of them to a third party for expeditious handling. That frees the officer's time for more important cases. Due process values are also served by referral of claims against the government-- the avoidance of undue interest, or an appearance of it, in the outcome. Moreover, voluntary arbitration can draw some support from Buckley and Melcher, because of its noncoercive nature.

Where the executive has a substantial interest in the outcome, methods of structuring arbitration and selecting arbitrators can reflect that interest in a compromise with strict neutrality. The legality of a private delegation often depends on a court's judgment whether the composition of the deciding group is representative of the interests affected.[111] Thus, the goal of arbitral schemes should be balance rather than unalloyed neutrality. Frequently, those selecting private deciders must weigh the benefits of expertise in the subject matter against the costs to neutrality from the source of the expertise, for instance prior service in the agency or industry. The Administrative Conference has recognized the inevitability of these tradeoffs in its recommendation on acquiring the services of ADR neutrals.[112]

There are several ways to pursue balance in arbitration. First, the choice to arbitrate can be vested with a public/private body. For example, arbitration of contract impasses with federal workers occurs on the approval of the Federal Service Impasses Panel, a part-time body composed partly of government employees.[113] This approach responds to the fact that "interest" arbitration, which resolves distributional issues between the parties on a prospective basis, is materially more policy-oriented than "grievance" arbitration, which considers rights under preexisting arrangements.[114]

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[111] Note, Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking, 94 Harv. L. Rev. 1871, 1883 & n.66 (1981).

[112] 1 CFR § 305.86-8; see generally Ruttinger, Acquiring the Services of Neutrals for Alternative Disputes Resolution and Negotiated Rulemaking, Report for the Administrative Conference of the United States (1986).

[113] 5 U.S.C. § 7119.

Second, if a multimember panel is used, its composition can reflect affected interests in appropriate proportions.[115] For example, bargaining impasses between the Postal Service and its employees are submitted to an arbitral board composed of one member selected by the Service, one by the union, and a third selected by the other two members.[116] In another example of a mixed panel, the Department of Education adjudicates certain disputes with its grant recipients through a board formed of a minority of federal employees and a majority of private members.[117]

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[114] See generally Kanowitz, supra note 21, at 244-50; Craver, supra note 12; Note, Binding Interest Arbitration in the Public Sector: Is it Constitutional?, 18 Wm. & Mary L. Rev. 787 (1977).

[115] See Melcher v. Federal Open Market Committee, 644 F.Supp. 510, 523 (D.D.C. 1986) (Buckley concerns alleviated by the presence of a government majority on the FOMC).

[116] 39 U.S.C. § 1207. Failing agreement on a third member, the Director of the Federal Mediation and Conciliation Service chooses one.

[117] 20 U.S.C. § 1234(c); see generally Boasberg, Klores, Feldesman & Tucker, Federal Grant Dispute Resolution, A Report for the Administrative Conference of the United

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Third, even if a single arbitrator is employed, the selection procedure can take the preferences of both sides into account. In commercial arbitration, the American Arbitration Association sends a list of names to the parties, who strike those to whom they object and number the others in order of preference. The AAA selects the arbitrator according to mutual preference.[118] Federal agencies have borrowed these practices, sometimes by direct referral to the AAA.[119]

These techniques should furnish the executive sufficient tools to meet supervisory needs related to selecting the deciders. Compare administrative adjudication, usually performed in the first instance by Administrative Law Judges. In both cases, an agency can consider the overall neutrality and competence of the pool of deciders when deciding whether to utilize their services instead of alternative processes. In arbitration, agencies can also influence the choice of a

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[117] States, in Mezines, Stein & Graff, Administrative Law § 54.05 (1983).

[118] Coulson, supra note 19, at 34. The person selected is required to disclose "any circumstances likely to affect impartiality," and is subject to disqualification by the AAA. Id. at 35.

[119] E.g., 29 CFR § 1440 App. (pesticide registrations); 40 CFR § 305.31 (Superfund).

decider for the case at hand. In contrast, ALJs are usually assigned in rotation.[120] This comparison does not consider, though, the nature of an appropriate role for executive supervision of adjudicators. I now turn to that topic.

C. Supervising Arbitrators.

Arbitration in federal programs should be subject to two kinds of executive monitoring. First, there should always be some overall scrutiny of whether it is meeting expectations. Like any procedure, arbitration is more successful for some disputes than others.[121] Especially in an era of experimentation with ADR techniques, the executive has a continuing monitoring responsibility. Federal arbitration programs often concern large stakes, such as millions of dollars of aggregate expenditures of public or private money.[122] For some arbitral programs, then, "wholesale" review is more important to the executive than is "retail" review of a particular decision.

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[120] 5 CFR § 930.212. The Supreme Court, however, has approved some agency discretion to match an ALJ's background to the subject matter. Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 139-40 (1953).

[121] See Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 916 (1979)(emphasizing the connection between the collective bargaining relationship and the success of labor arbitration).

Generalized oversight also helps to protect private delegations from judicial invalidation. For example, many disputes between securities dealers and their customers are arbited by the self-regulatory organizations of the industry; courts approving this scheme have relied partly on federal approval of the arbitral procedures.[123] Oversight has its perils, though: when the government is a party to arbitration, monitoring must steer a careful course, assessing the overall accuracy of the process without intervening in particular cases.[124]

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[122] A number of specific examples are discussed in §§ III and IV infra.

[123] Todd & Co., Inc. v. SEC, 557 F. 2d 1008, 1012 (3d Cir. 1977); R. H. Johnson & Co. v. SEC, 198 F. 2d 690, 695 (2d Cir.) (Frank, J.), cert. denied, 344 U.S. 855 (1952); see generally Fletcher, Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements, 71 Minn. L. Rev. 393 (1987); Katsoris, The Arbitration of a Public Securities Dispute, 53 Fordham L. Rev. 279 (1984).

[124] Compare Ass'n of Administrative Law Judges, Inc. v. Heckler, 594 F.Supp. 1132 (D.D.C. 1984) (generalized executive review of ALJ performance is legitimate, as long as it does not skew the outcome of particular adjudications); see also Note, Administrative Law Judges,

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Second, agencies need to control the conduct of particular arbitrations, within limits. They can do so in two primary ways: by providing a standard for decision, and by reviewing awards to determine fidelity to it.[125] Ordinarily, an agency can elaborate its statutory standards through rulemaking. Therefore, even where statutes mandate use of arbitration, the executive can control it. Of course, the specificity of standards should vary with the subject matter.[126] Instructions should be more detailed for relatively policy-laden subjects (such as interest arbitration in labor relations) than for more fact-intensive ones.[127]

Some arbitration uses standardless norms such as substantial justice. Here, executive supervision would occur

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[124] Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability, 54 G.W. L. Rev. 591 (1986).

[125] Also, if an arbitrator is exceeding delegated authority in a pending case, an agency may seek redress by invoking the familiar jurisdiction of the courts to determine an arbitrator's jurisdiction. See text at notes 25-26 supra.

[126] I discuss the sufficiency of standards in § IV infra as they relate to fairness to affected individuals; here the concern is with the executive's needs.

[127] See Craver, supra note 12, at 566-67, for examples of varying standards used for interest arbitration.

only in the choice to resort to arbitration. Therefore, such a standard should not be used where significant policy effects are present. For example, it would be inappropriate for claims against the government, because it could allow payments unauthorized by law.

Review of arbitration can occur either in the agency or in court under the criteria of the U.S. Arbitration Act, which allows vacating awards on very narrow grounds that include corruption and facial illegality.[128] The ACUS recommendation facilitates this limited review by calling for a brief, informal discussion of the factual and legal basis for an award. When the government is not a party to arbitration, agencies have little reason to displace judicial review. When the government is a party, supervisory needs may call for administrative review.[129] If so, there would be no need for the courts to exercise duplicative "retail" review, although they could examine issues concerning the "wholesale" validity of the scheme, as I will discuss.

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[128] 9 U.S.C. § 10. The grounds include: (a) "corruption, fraud, or undue means," (c) "refusing to hear evidence pertinent . . . to the controversy," and (d) "exceed[ing] their powers . . . ."

[129] As limited by the Arbitration Act, this function would not threaten introducing impermissible levels of bias.

Administrative review under the Arbitration Act's standards should satisfy the executive's supervisory needs. Again, it is instructive to compare administrative adjudication, which is structured to reflect its greater policy content. Agencies may overturn ALJ decisions readily, as long as the final decision is supported by substantial evidence.[130] Indeed, final adjudicative authority is often lodged with the political executives at the head of the agency.[131] In arbitration, the executive loses ordinary fact review, but gains the speedier resolution of disputes. More intensive review would vitiate the distinctive advantages of arbitration, because it would force arbitrators to provide the procedural formalities necessary to build a suitable record.

II. THE SCOPE OF ARTICLE III.

A. Allocating Judicial Power to Agencies and Arbitrators.

To what extent may adjudicative authority that could be assigned to the federal courts be granted to private deciders? Before addressing this question directly, we must consider a preliminary issue: to what extent may executive officers exercise or supervise potential article III functions? Until recently, one would have thought that the latter issue was settled by Crowell v. Benson,[132] which upheld the placement of adjudicative authority in an administrative agency. The problems stem from some implications of the Court's recent decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,[133] in which a badly divided Court held that the allocation of certain functions to bankruptcy judges violated article III.

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[130] E.g., FCC v. Allentown Broadcasting Co., 349 U.S. 358, 364 (1955).

[131] See, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

In Northern Pipeline, Congress had created bankruptcy judges without article III status,[134] but with powers closely resembling those of federal judges. The bankruptcy judges were authorized to decide all issues pertinent to the proceedings, including claims arising under state law, with review by article III judges.[135] A plurality of four justices[136] signed a formalist opinion that defined some matters as inherently judicial in the sense that they must be performed by federal courts, rather than supervised by them. Bankruptcy matters did not come within a set of exceptions to mandatory article III jurisdiction that the plurality identified.

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[132] 285 U.S. 22 (1932).

[133] 458 U.S. 50 (1982).

[134] Instead of life tenure, they had 14-year terms; there were no protections against salary diminution.

The exception pertinent to us is the one for adjudication of "public rights," which the plurality defined narrowly as claims against government that Congress could commit entirely to executive discretion, but not controversies between private persons arising incident to a federal program. The public rights doctrine originated in a conclusory passage in Murray's Lessee v. Hoboken Land & Improvement Co.,[137] in which the Court upheld a summary procedure for government recoupment of its funds from one of its customs collectors:

> [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is

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[135] Review was to be by the "clearly erroneous" standard, 458 U.S. at 55-56 n. 5.

[136] Brennan, Marshall, Blackmun, and Stevens.

[137] 18 How. 272, 284 (1856).

> the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

The Court has never provided a satisfactory explanation of the public rights doctrine. Instead, the Court, groping for appropriate limits to the jurisdiction of legislative or administrative courts, has used it to label outcomes.[138] That is unfortunate because of the difficulty of the problem.

The Northern Pipeline plurality thought that public rights cases could be committed to agencies, at least with judicial review.[139] It appeared to be more willing to accept nonjudicial decision of issues of fact than of law, since it characterized Crowell as involving only the former.[140] The plurality conceded, however, that the doctrines Crowell relied on to preserve plenary review of issues of law had eroded in the interim.[141] This line of analysis cast doubt on the permissibility of ordinary delegations of adjudicative power to agencies, because the plurality did not specify the relationship between agencies and courts that was necessary to pass constitutional scrutiny.

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[138] See generally Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L.J. 197.

[139] 458 U.S. at 67-68 & n. 18.

The plurality explained the dichotomy between public and private rights as resting partly on sovereign immunity. Congress, free to deny all relief for claims against the government, may take the lesser step of allocating the claims to an alternative forum. Accordingly, the plurality would not define public rights as everything created pursuant to the substantive powers of Congress, because that would include some displaced private rights of action.[142] This rationale does not persuasively explain, however, why Congress may more readily shift federal questions out of the courts than diversity cases.[143]

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[140] 458 U.S. at 78-82.

[141] Id. at 82 n. 34.

[142] 458 U.S. at 80 n. 32.

Two concurring justices[144] would have required only that removed state law claims be decided by an article III court. The dissenters[145] pointed out the inconsistency of the plurality's formulation with the nature of much administrative adjudication.[146] They thought that the bankruptcy scheme satisfied a functional inquiry. They were prepared to examine the strength of the legislative interest in placing decision in another forum (in this case, a heavy caseload and a need for specialization). They gave weight to the preservation of judicial review. They found no danger that the other branches were aggrandizing themselves at the expense of the courts as long as the subject matter was not of special significance to the political branches.

The reason that Northern Pipeline cast broad and troubling implications beyond its bankruptcy context lies in the plurality's formalist approach.[147] The broad sweep of formalism is inappropriate for deciding how to allocate adjudicative power among the branches. The justifications for formalism (preventing aggrandizement and assuring political accountability) are minimal here.[148] Functional analysis focuses the Court's attention on the policies underlying article III, and permits the diverse procedural arrangements that the structure of our government demands. Fortunately, later cases have employed functionalism to curtail the implications of Northern Pipeline.

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[143] Redish, supra note 138, at 208-11.

[144] Rehnquist and O'Connor.

[145] White, Burger, and Powell.

[146] 458 U.S. at 101-02.

In Thomas v. Union Carbide Agr. Products Co.,[149] the Court upheld mandatory arbitration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[150] Under the Act, manufacturers wishing to register a pesticide must give the EPA their research data on the product's effects. The EPA considers the data for both the accompanying registration and later ones for similar products, submitted by other manufacturers. Later registrants must compensate earlier ones for the use of the data, in amounts determined by arbitration if the manufacturers cannot agree. The agency uses the AAA's roster of commercial arbitrators and its usual methods for mutual selection by the parties; there are special AAA procedures for conducting FIFRA arbitrations.[151] The arbitrator's findings and determination can be set aside in federal court only for "fraud, misrepresentation, or other misconduct."[152]

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[147] Strauss, supra note 5, at 629-33.

[148] See Bruff, supra note 75, at 502-09.

[149] 105 S. Ct. 3325 (1985); see generally Note, FIFRA Data-Cost Arbitration and the Judicial Power: Thomas v. Union Carbide Agricultural Products Co., 13 Eco. L. Q. 609 (1986).

[150] 7 U.S.C. § 136a(c)(1)(D)(ii).

Justice O'Connor's majority opinion rejected "doctrinaire reliance on formal categories" as a guide to article III, in favor of attention to the origin of the right at issue and the congressional purpose behind the scheme. The majority characterized FIFRA as creating a compensatory right with many public characteristics, as in use of private data by the EPA.[153] It concluded that Congress could authorize an

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[151] 29 CFR § 1440 App.

[152] 7 U.S.C. § 136a (c)(1)(D)(ii). The EPA can enforce compliance with the award through sanctions including

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[153] The Court had already held EPA's consideration of the data to be a "public use," although the "most direct

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agency to "allocate costs and benefits among voluntary participants" in a regulatory program without providing an article III adjudication.

Justice O'Connor characterized Northern Pipeline as holding only that Congress could not give a non-article III court power to decide state law contract actions without consent of the litigants and subject only to ordinary appellate review. She rejected an argument that FIFRA had created a "private right," explicitly disapproving the definition advanced by the Northern Pipeline plurality insofar as it turned on whether "a dispute is between the Government and an individual."[154] Justices Brennan, Marshall, and Blackmun concurred, explaining their Northern Pipeline position as focusing on the state law nature of the claims involved, and abandoning any restriction of

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[152] denial of compensation or cancellation of a party's registration, as the case may be.

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[153] beneficiaries" of that use were the later applicants. Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862 (1984)(holding that in certain circumstances this public use effected a compensable taking).

[154] 104 S.Ct at 3335-36.

public rights cases to those in which the government is a party.[155]

In passing, the Court squelched the Northern Pipeline plurality's threat to the structure of the administrative state. The Court said that because the statute in Crowell replaced a common law action with a statutory one, it fell within mandatory article III jurisdiction.[156] Nevertheless, the Court recognized that judicial review of administrative adjudication is often limited or even unavailable.[157] Thus the Thomas majority removed any question that the continued vitality of Crowell rests on the outmoded doctrines requiring stringent judicial review that the Crowell Court employed.[158]

Turning to the use of arbitration, the Court noted Congress' need to streamline compensation controversies.[159] The Court perceived a close nexus between use of arbitration and effective administration of the pesticide registration program. And it emphasized the consent of affected firms: it considered the danger of encroachment on the judiciary's central role to be "at a minimum when no unwilling defendant is subjected to judicial enforcement power."

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[155] Id. at 3341-41. Justice Stevens, also concurring, thought the challengers lacked standing.

[156] 105 S.Ct. at 3336.

[157] Id. at 3334.

[158] See text at note 54 supra.

[159] Arbitration replaces an earlier procedure by which EPA adjudicated compensation, subject to judicial review. This proved cumbersome and unworkable; in 1978 Congress turned to arbitration. 105 S.Ct. at 3328-30.

The Court accepted the statute's limitations on judicial review, which it read to allow reversing arbitrators "who abuse or exceed their powers or willfully misconstrue their mandate under the governing law."[160] The concurring Justices, like the majority, echoed the "manifest disregard for the law" standard that has widespread use in judicial review of arbitration.[161] The Court also held that review for constitutional error was available; that alleviated any due process concerns about the extent of review.[162]

Thomas suggests that common law claims must be left with the judiciary. The Court has since modified its stance. In

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[160] 105 S. Ct. at 3339.

[161] Id. at 3344; see Fletcher, Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements, 71 Minn. L. Rev. 393, 456 (1987).

[162] The parties had abandoned due process objections to the nature of statutory review of the arbitrations, so the Court did not formally address that issue. 105 S. Ct. at 3339.

Commodity Futures Trading Com'n v. Schor,[163] the Court upheld the CFTC's power to entertain state law counterclaims in reparation proceedings, in which disgruntled customers seek redress for brokers' violations of statute or regulations. Agency adjudicators were authorized to decide counterclaims arising out of the transactions in the complaint, if the respondent chose to assert them there. Schor filed a claim for reparations, and was met with a counterclaim for debt.

Justice O'Connor's opinion for seven justices relied in part on consent-- Schor chose the CFTC's "quicker and less expensive" procedure, instead of a lawsuit. Indeed, the Court compared this option to arbitration, and thought that choice of alternate procedure minimized separation of powers concerns.[164] The Court then asked whether the new forum exercised the "range of jurisdiction and powers normally vested only in article III courts," and whether the latter retained the "essential attributes of judicial power." Only the jurisdiction over counterclaims differed from the usual agency model.[165] The Court saw no reason to deny agencies all pendent jurisdiction,[166] especially where it allowed informal resolution of disputes arising under the federal program.[167] Thus, Schor suggests that agencies may resolve any state-law claim that is closely related to a federal issue within their jurisdiction.

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[163] 106 S.Ct. 3245 (1986).

[164] 106 S.Ct. at 3260.

In both Thomas and Schor the Court associated coercion with inherent judicial power. That casts some doubt on strictly nonconsensual arbitration, for example in regulatory enforcement. Nevertheless, the Court's characterization of FIFRA registrations as "voluntary" may signal its intention to employ a narrow definition of coercion. Therefore, the Court's article III concerns may be satisfied when either participation in the federal program or resort to arbitration has voluntary aspects. The Court sometimes examines consent more closely, however, in cases directly presenting issues about the fairness of arbitration to affected persons.[168]

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[165] The CFTC's jurisdiction was specialized; its enforcement powers were limited; its orders received normal judicial review.

[166] Concerns for federalism were insufficient to condemn the scheme, since federal courts could have entertained the claims.

[167] Justices Brennan and Marshall, dissenting, argued that the majority was allowing the undue dilution of judicial authority in service of legislative convenience.

Another of the Court's concerns is to honor the original purpose of article III's tenure protections: to guarantee the independence of adjudication from political pressure emanating from the executive or Congress. In Thomas, the Court remarked that shifting from agency adjudicators to private arbitrators "surely does not diminish the likelihood of impartial decision-making, free from political influence."[169] And in Schor it noted that Congress had placed adjudication in an independent agency, which would be "relatively immune from the 'political winds that sweep Washington.'"[170] This suggests that arbitration, compared to the alternative of agency adjudication, promotes article III values by increasing the independence of the decider.

Today, it seems unlikely that Congress will run afoul of Northern Pipeline unless no substantial purpose is served other than shifting business out of the federal courts, and the powers of the new tribunal (and, perhaps, the tenure of the deciders) closely approximate those of the courts. In such situations, courts are likely to find interference with their core functions. In contrast, where expeditious process clearly serves non-article III functions, such as ordinary program administration, the courts are not likely to insist that their already heavy caseload be increased. Therefore, arbitration should be safe from a successful article III assault as long as it is confined to specialized subject matter within federal programs that have related executive functions. Indeed, allocating such matters to agencies or arbitrators can free the courts to perform their most important responsibilities.

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[168] See § III. B. infra.

[169] 105 S.Ct. at 3338.

[170] 106 S.Ct. at 3250.

B. Nonarbitrable Subject Matter.

Judicial deference to agreements to arbitrate has limits. The Court has held that certain federal statutes confer nonwaivable rights to federal court enforcement. The doctrine stems from Wilko v. Swan,[171] in which the Court refused to enforce an arbitration agreement between a securities customer and a brokerage firm. The Court held that the policies of the Arbitration Act were overridden by a provision in the

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[171] 346 U.S. 427 (1953).

Securities Act of 1933 forbidding waiver of compliance with the Act's requisites. The Court was concerned that disparities in bargaining power could debase consent to arbitration. Nor did the Court consider judicial review of arbitral awards sufficient to protect the customer's statutory rights, in view of the "manifest disregard of the law" standard used by courts under the Arbitration Act.[172]

Wilko thus demonstrates the potential for tension between the contractual values of the Arbitration Act and the paternal values of much regulatory legislation. Not surprisingly, the Court has wavered between these values in subsequent cases.[173] For example, the Court recently enforced an agreement to arbitrate antitrust claims.[174] It was unwilling to assume that arbitration was an inadequate mechanism to resolve public law issues, even in view of the minimal nature of judicial review.

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[172] 346 U.S. at 436-37.

[173] See generally Fletcher, supra note 123, at 404-20; Kanowitz, supra note 21, at 257-61. Another securities case pends in the Supreme Court. McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir.), cert. granted, 107 S.Ct. 60 (1986)(No. 86-44).

[174] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S.Ct. 3346 (1985).

Confusion and inconsistency in this body of case law probably result from the presence of a number of competing considerations. To sort them out, let us consider a prominent recent case. In Alexander v. Gardner-Denver Co.,[175] the Court held that a collective-bargaining agreement to arbitrate discrimination charges did not foreclose resort to a Title VII suit.[176] The Court appeared to take a careful approach to consent issues: it suggested that the union's acceptance of arbitration should not be imputed to its individual members for claims of discrimination as opposed to economic issues, for which shared interests would make the union a more reliable proxy.[177] The courts should examine the adequacy of consent in arbitration programs; as in Alexander, they can do so for the general context without delving into the circumstances of each individual referral.

The Alexander Court emphasized that "the resolution of statutory or constitutional issues is a primary responsibility of courts."[178] Judge Edwards has suggested that although the elaboration of important public law norms should be left to the federal courts, the application of clearly defined rules of law can safely be left to arbitrators-- indeed, such an allocation of responsibilities might maximize the efficiency of public law.[179] This recognizes that the legal skills required to interpret statutes do not differ sharply from those required to interpret contracts.[180] Still, there is no bright line between law-making and law-applying-- Alexander noted the broad language of Title VII, suggesting that the application of this norm cannot yet be readily separated from its elaboration. That suggests that courts may countenance arbitration only when it steers well clear of the line.

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[175] 415 U.S. 36 (1974).

[176] See also McDonald v. City of West Branch, 104 S.Ct. 1799 (1984)(unappealed arbitration does not preclude civil rights litigation); Carlisle, supra note 28.

[177] 415 U.S. at 51. Compare Fiss, Against Settlement, 93 Yale L.J. 1073, 1078-82 (1984) (expressing concerns for the adequacy of representation in settlements).

The Alexander Court thought that the fact-finding process of arbitration was inferior to a trial for the resolution of Title VII claims, but its "reasons" for this conclusion simply described the ways that arbitration usually deviates from trial process.[181] The Court's sense that arbitration may be inappropriate for claims related to constitutional rights was sound. In constitutional litigation generally, the Court exercises relatively independent review of the facts found below.[182] Arbitration, though, leaves fact determinations in the hands of the arbitrator and disables intensive fact review.

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[178] 415 U.S. at 57.

[179] Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668, 680 (1986).

[180] Devine v. White, 697 F.2d 421, 438-39 (D.C. Cir. 1983) (Edwards, J.). But see Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974): "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."

Perhaps, then, judicial fact-finding should always be preserved for the enforcement of constitutional rights, even when resort to arbitration appears to be truly voluntary. I think such a limitation could sweep too broadly. For example, it might be best to arbitrate some prisoner's grievances instead of flooding the federal courts with their lawsuits. Yet prisoners have proved astute at converting everything into constitutional claims.[183] Thus, although the presence of a colorable constitutional claim identifies situations where courts are likely to treat federal court enforcement as mandatory, no categorical distinction seems appropriate.

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[181] 415 U.S. at 57-58.

[182] See generally Monaghan, supra note 54.

[183] E.g., Parratt v. Taylor, 451 U.S. 527 (1981) (negligent loss of a hobby kit as constitutional deprivation of property); overruled, Daniels v. Williams, 106 S. Ct. 662, 665 (1986).

The ACUS disfavors voluntary arbitration where precedent is to be set or where maintaining established norms is of "special importance."[184] Under present law, it is difficult to be much more specific than that.[185] A somewhat more adventuresome formulation would authorize arbitration for all law-applying, and might make an exception where constitutional rights are implicated.

C. Limiting Judicial Review.

Judicial review of arbitration has always been more limited than review of administrative adjudication. Here I consider the minimum level that should be preserved. Thomas suggests that the courts will review at least the facial consistency of an arbitral award with statutory criteria and constitutional norms. The ACUS recommendation aids such review by calling for a brief statement of the basis of an award. Courts could perform these inquiries without straining the criteria of the Arbitration Act and without probing the factual basis of awards, which would destroy the informality that accounts for the virtues of arbitration.

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[184] 1 CFR § 305.86-3 B.5.(b). The recommendation on mandatory arbitration contains a similar limitation for precedential effect, and requires an ascertainable norm for decision, but does not explicitly refer to cases involving the need to maintain norms. Id. C.8.

[185] See, e.g., Dean Witter Reynolds, Inc. v. Byrd, 105 S.Ct. 1238, 1244 (White, J., concurring) (substantial doubt and controversy often surround the waivability of federal court enforcement of particular public rights).

Courts often read statutes that appear to preclude all review to permit constitutional inquiry.[186] In that way, they avoid reaching troubling issues about the power of Congress to insulate administrative action completely. Nevertheless, some functions are unreviewable. Like arbitration programs, these functions often feature broad agency discretion, needs for expertise, informality, and expedition, a large volume of potentially appealable actions, and the presence of other methods of preventing abuses of discretion.[187]

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[186] E.g., Johnson v. Robison, 415 U.S. 361 (1974); Bartlett v. Bowen, --- F.2d --- (D.C. Cir. March 17, 1987) (limitation on judicial review in Medicare Act does not apply to constitutional challenges to Act).

[187] Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion, 82 Harv. L. Rev. 366 (1968).

In general, the courts seem most likely to reach issues that concern the overall structure and validity of a statutory scheme, rather than its application to particular facts. Thus, the Court recently considered whether arbitration of Medicare claims denies procedural due process.[188] A companion case, United States v. Erika, Inc.,[189] found that no judicial review of particular awards was authorized. The Court noted that the preclusion did not extend to initial determinations of entitlement to participate in the Medicare program, but only to the processing of particular claims. So limited, the preclusion prevented "the overloading of the courts with trivial matters."[190]

Since the ACUS does not recommend arbitration for elaborating public law norms, most arbitrations should be free of substantial constitutional issues. Therefore, "retail" review for misconduct and for inconsistency with statutory standards can probably be placed in the agencies when the government is not a party. Here the important goal is to have an outside check on the arbitrator's action.[191] If the courts are ordinarily willing to defer to interpretations of statutes by agencies which are administering them, there seems equal reason to defer to an agency that is reviewing an arbitrator.

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[188] Schweiker v. McClure, 456 U.S. 188 (1982); see § IV infra.

[189] 456 U.S. 201 (1982).

[190] 456 U.S. at 210 n.13, quoting the legislative history. The Court did not, however, reach issues concerning any constitutional right to review. Id. at 211 n.14.

The ACUS recommendation would allow parties to consent to arbitration under a substantial justice standard. The absence of standards for an arbitrator's decision may trouble the courts, because the check of judicial review would be less effective.[192] In light of the recommended limitations on the use of arbitration, which would exclude it from situations involving the generation of precedent, the maintenance of important public rights, or the presence of third party effects, the recognition of a role for standardless arbitration should be acceptable. No interference with core functions of the courts would occur. The courts have recognized that some decisions cannot be confined by meaningful standards. For example, highly discretionary executive functions are often unreviewable in court.[193]

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[191] Thus, determinations of the arbitrability of particular issues might also be shifted from the courts to the agencies when the government is not a party.

[192] Review for misconduct or corruption of the arbitrator would be available, but not review for excess of authority.

IV. DUE PROCESS.

In Schweiker v. McClure,[194] a unanimous Court upheld the decision of disputed Medicare claims by private insurance carriers, without a right of appeal. The program in question is a voluntary one that supplements basic Medicare by covering most of the cost of certain medical services. It is financed by federal appropriations and premiums from participants. As the Court noted, the program resembles subsidized private insurance on a massive scale: 27 million participants, $10 billion in annual benefits, and 158 million claims in one year.

Congress authorizes HHS to contract with private insurers, such as Blue Cross, to administer claims payments.[195] HHS pays administrative costs and specifies the claims process. The carrier makes an initial determination whether a claim is a reasonable charge for covered services. On denial, the claimant receives a de novo redetermination on a written appeal to a new decider. Disputes over $100 then receive an oral hearing before a carrier employee not involved in the prior decisions, with a written decision based on the record, but with no further appeal.

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[193] See generally Heckler v. Chaney, 105 S.Ct. 1649 (1985).

[194] 456 U.S. 188 (1982).

[195] 42 U.S.C. § 1395u.

The Court began by rejecting a due process charge of bias against the deciders. It could find no financial interest in the carriers or their employees in denying claims. The Court then turned to the argument that due process required additional administrative or judicial review by a government officer. Applying the familiar criteria of Mathews v. Eldridge,[196] the Court assumed that the weight of the private interest was "considerable." The weight of the government's interest in efficiency was unclear, but the Court assumed that providing ALJ review would not be "unduly burdensome." Focusing on the risk of erroneous decision and the value of additional process, the Court stressed HHS requirements that deciders be both qualified to conduct hearings on medical matters and thoroughly familiar with the program and its governing law and policy. The Court perceived no deficiencies in this, nor any need that deciders be attorneys.

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[196] 424 U.S. 319, 335 (1976).

Voluntary arbitration should ordinarily satisfy due process criteria. In general, there is no better guarantee of fairness than a party's consent to a particular procedure, if the alternatives are also acceptable. (Here, the alternative would be ordinary administrative process.) Granted, somewhere there are limits to what we will allow a citizen to bargain away for the benefits of expeditious decision. Those limits should not be tested by the ACUS recommendation, which disfavors arbitration for decision of important public rights.

Consent of a different kind attends some arbitration. As in McClure or Thomas, there is voluntary participation in the federal program, but not assent to arbitral techniques. Here one should be circumspect in relaxing inquiry into procedural fairness. The doctrine of unconstitutional conditions, checkered as its history may be, sets limits to the government's power to bargain for rights with benefits.[197] Thus, in McClure it was significant that the underlying entitlement to participate in Medicare was not subject to arbitration, unlike the amount of particular claims.

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[197] See generally Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293 (1984).

Under the Eldridge formulation, the acceptability of arbitration depends on the importance of the individual's interest in the program's benefits. The ACUS recommends mandatory arbitration only for disputes between private parties, not for claims against the government. Since McClure involves de facto claims on the public purse, the recommendation seems unnecessarily cautious in this respect. It could be reformulated to invoke the Eldridge calculus.

In regard to the accuracy of process and the need for additional safeguards, an important consideration is whether the arbitral scheme gives the parties a role in selecting the decider. Recall Judge Friendly's point that assurances of neutrality reduce the need for other procedural safeguards."[198] McClure shows that the Court does not regard agency deciders as necessarily more fair or reliable than private ones, as long as indicia of bias or interest are absent and assurances of competency are present.

The fairness of arbitration is in part a function of the specificity of the governing standard. A standard should be specific enough to meet the primary needs of the parties, the arbitrator, and the reviewing entities. The parties need enough information to exercise meaningful consent to the use of arbitration and to present their cases. The arbitrators need enough guidance to make awards that will be consistent with each other. The reviewing entities must be able to judge the facial validity of awards. Consider the standard involved in Thomas: arbitrators are to provide "compensation" to pesticide registrants for the use of their data.[199] This standard is very unconfining-- for example, does it mean the cost of creating the data or the value to the later registrant?[200] An agency presented with such a vague statutory directive should elaborate it through rulemaking.

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[198] See text at note 68 supra.

In McClure, as in Eldridge, some guarantees of neutrality stem from the functions assigned to the decider. Hearings are meant to be nonadversary. The government is not represented, and the decider is charged with helping the private applicant develop his case.[201] In such an atmosphere, any incentive to favor one side probably benefits the claimant, who enjoys direct contact with the decider. The McClure Court mentioned the government's interest in avoiding overpayment of claims only in passing,[202] in the context of rejecting a bias claim based on HHS attempts to encourage carriers to detect overpayments. This suggests that agencies should avoid instructions to deciders that seem to promote bias for either side.[203]

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[199] The Court did not reach a delegation doctrine challenge to the adequacy of this standard. 105 S.Ct. 3339-40.

[200] See Sathon, Inc. v. American Arbitration Ass'n, 20 ERC 2241 (N.D. Ill. 1984)(challenge to delegation not reached); PPG Industries, Inc. v. Stauffer Chemical Co., 637 F. Supp. 85 (D.D.C. 1986) (upholding the standard).

For guarantees of decider competency, the Court seems prepared to accept practical considerations of background and training, without regard to formal affiliation or status. Whether lawyers are needed should depend on the extent to which formal rules of evidence are to be followed, and on the need for other kinds of expertise in the decider. As the Court remarked in the context of upholding the Veterans Administration's $10 fee limit for lawyers in claims proceedings, which effectively excludes them: "Simple factual questions are capable of resolution in a nonadversarial context, and it is less than crystal clear why lawyers must be available to identify possible errors in medical judgment."[204]

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[201] 456 U.S. at 197 n. 11.

[202] 456 U.S. at 196 n. 9.

[203] See text at notes 25-26 supra.

Under any particular program, the appropriateness of the arbitral process supplied depends on the nature of the participants and the issues. For example, in Gray Panthers v. Schweiker,[205] the court held that the Medicare procedure for claims under $100 failed to satisfy due process in two respects. First, notice of procedural options needed to be adapted to the capacities of elderly and infirm claimants. Second, oral hearings were necessary for claims involving issues of credibility. Still, the court emphasized that process can be geared to "the generality of cases, not the rare exceptions."[206] Therefore, if credibility disputes were rare, overall process would not need to be geared to them.

Provision for review by agency or court under the standards of the Arbitration Act is another check on the accuracy of arbitrations. It focuses on the two most important ways in which arbitration can go awry-- loss of neutrality in the decider, and an award exceeding the bounds of the *ex ante* expectations of the parties. And it would be difficult to provide added checks without radically formalizing the process.

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[204] Walters v. National Ass'n of Radiation Survivors, 105 S. Ct. 3180, 3194 (1985).

[205] 716 F.2d 23 (D.C. Cir. 1983).

[206] Id. at 36, quoting Eldridge, 424 U.S. at 344.

The strength of the government's interest in informality varies. For example, it is large in high-volume, small-dollar contexts such as Medicare. In all the situations that fall within the ACUS recommendation, fact questions predominate. If expeditious process is available here, more resources will be left for the formal process needed for resolution of policy or formation of precedent. Insofar as the government's fiscal interest involves payment of awards as well as provision of process, however, the government's advantage is not a simple matter of minimizing procedural costs. Instead, the government should seek process that optimally balances accuracy and cost. This is a matter for informed judgment-- as *Eldridge* emphasizes, the agency's choice of process is entitled to deference by a court weighing the dictates of due process.

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The Unspoken Resistance to Alternative Dispute Resolution

Marguerite Millhauser

The current effort to introduce alternative methodologies for resolving legal disputes into the mainstream of American corporate and legal systems seems to be meeting resistance. However, much of this resistance is unspoken and therefore difficult to identify. Alternative dispute resolution, or ADR as it has come to be known, is one of those subjects that receives almost universal endorsement in theory but substantially less in practice. There are probably many reasons for this dichotomy. At least some of them, however, can be traced to psychological and sociological traits that go to the very root of how we function as individuals and in society.

These traits may be keys to understanding the unspoken resistance of potential users of alternative methodologies. They also may explain what appears at times to be a failure by various groups and individuals promoting different approaches to dispute resolution to handle their own controversies in the more constructive ways they are advocating for others. My purpose in this article is to identify some of the underlying barriers to use of alternative dispute resolution processes, particularly those that rely upon some form of consensus building or voluntary agreement to reach a solution. Identification of these barriers, in turn, may help dispute resolution professionals and potential users of alternative processes make provision in the newly evolving systems for the concerns that are at the root of these barriers and likely to change, if at all, only over long periods of time.

The underlying premise of the analysis that follows is that responses to alternative methodologies for dispute resolution are driven, at least in part, by often unstated and sometimes unrecognized human needs and desires. It further assumes that certain of those needs and desires are created and more easily responded to by the individual alone, while others are more dependent upon the organization and larger world in which that individual participates. Two perspectives are considered: that of the client and that of the lawyer.

Client Considerations

Whether the client is a corporation or an individual, human instincts and motivations are critical considerations in the process of dispute resolution. All too often, corporate attitudes and conduct are analyzed separately from the attitudes and conduct of those who are in positions of control. If one looks closely, however, the two often are indistinct.

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At this more personal level, there are a number of factors at work, one of the most important of which is trust. In general, people learn to be somewhat wary of one another, particularly in commercial and political contexts. For example, one person or entity generally will not look out for another's interests if faced with a choice that pits those interests against self-interest. How far one will go in accommodating the interests of another to the detriment of one's own varies from individual to individual. But at some point, even the most altruistic person is likely to draw the line and act in his or her own self-interest.[1] Without labelling such action right or wrong, it is sufficient to note its occurrence and acknowledge that even in the absence of a dispute, an ethic exists, in varying degrees, of watching out for one's own interests and protecting them even at the possible expense of another. While few people would argue with this principle, many are reluctant to accept its inevitable consequences.

One of those consequences is the occurrence of disputes. By the time a dispute erupts, interests have clashed and each side typically has decided to act in what it perceives to be its best interest. Accepting the principle stated above, this should come as no surprise. Yet many people react as though there has been a serious breach of trust. In their minds, the opposing party is exhibiting no concern about interests other than its own. Otherwise, there either would be no dispute or at least little or no need for outside assistance to resolve it. But, once the dispute has escalated to the point that litigation is contemplated, each side tends to assume that little or no such concern exists, and mutual trust has disappeared. At this stage, perceptions of having been wronged or unjustly accused of wrongdoing begin to control. Moreover, it is probable that efforts to resolve the matter on a conciliatory basis already will have been attempted and failed. In many instances, lawsuits are the culmination of a history of unsatisfactory dealings. Indeed, by the time a lawsuit is filed, the disputing parties are likely to view the trust they once had for each other as misplaced and contributing at least in part to their present problem.

In the face of such circumstances, it is not difficult to understand why processes that ask the parties to continue to work together in some fashion are resisted. Trust and goodwill no longer exist and, in their place, are likely to be anger, frustration and hostility. When a person wants something or believes he or she is "in the right," an instinctive reaction to opposition is anger. On the heels of the anger many times comes the urge to try to convince the other person of the error of the opposing view or position. When that person (or entity) refuses to acquiesce, a sense of frustration is likely to develop. Out of the frustration is born a desire to challenge the offending party by threatening letters, lawsuit or other means that have inherent in them a show of force.

These almost instinctive reactions, whether triggered at the outset of a dispute or at the point where efforts to reach agreement break down, are understandable. In a sense, they are forms of self protection. A breach of trust, if perceived as such, can be painful and spur a desire to retaliate in kind. Further, the anger and frustration that accompany most disputes are likely to be driven by egos that want or need to be right, or at least appreciated.

Beneath the egos are likely to lurk fears. For some, it is a fear of being wrong and the loss of stature, respect, or affection; for others it is fear of being taken advantage of or manipulated. Whatever the fear is, as long as it is there, or a risk is perceived, people will go to great lengths to protect themselves, even if that means engaging in lengthy, costly legal proceedings. Compared with the alternatives, which many view as perpetuating a more vulnerable state, the fighting route will seem preferable.[2]

Coupled with the internal workings of the individual are a number of external factors over which the individual often has no control. The organization for which one works may measure success by traditional yardsticks and value recovery of the last possible cent or establishment of a definitive principle over other outcomes. In that situation, the possibility of beating the other side and maximizing one's own reward is attractive. The corporate executive who is trying to advance in such an organization will not have the flexibility to utilize procedures less likely to achieve such ends. For him or her, litigation or other adversarial processes will continue to provide the best opportunities.[3]

Similarly, if an organization has a low tolerance for errors or misjudgments, the corporate official faced with the choice of acknowledging liability or channeling the matter into a long proceeding that has the potential of obfuscating the original misdeed (or postponing the day of reckoning) will almost certainly choose the latter. While allowing corporate officials to retain control of the process and responsibility for the decision are cited as benefits of voluntary forms of dispute resolution, less involvement may be preferable in cases where a party seeks to distance itself from the conduct in question or portray it as something other than it is.

Another example of the impact of existing norms is the concern expressed repeatedly that proposing a conciliatory approach will suggest weakness in the case or the party's commitment to it. Because so much emphasis is placed on appearances, people forget that the perception of an event need not define the event. An offer of settlement or an invitation to use a more conciliatory approach is not, in and of itself, an indication of weakness. One can have the strongest possible case and make such an offer. Regardless of how the other party chooses to interpret the action, a settlement offer neither changes the facts of the case nor an attorney's ability to prove the case.

Yet, by allowing concern over how actions are likely to be interpreted to control a situation, one person allows the other's definition of the circumstances to become their own. By doing that, more power is given to the other person than may actually exist, and the person acting out of fear of perception is rendered far less effective than he or she could be. In such circumstances the greater strength may lie in taking the action desired, recognizing how it could be perceived and being prepared not to let that perception control.[4] However, such strength is not the type typically appreciated or rewarded in a corporate context where the appearance of dominance has come to be valued.[5] An individual prepared to take such action may be deterred out of concern over how it will be interpreted by superiors.

In short, it is difficult to consider the viability of alternative methodologies for dispute resolution outside the context of the culture—corporate, political, or otherwise—in which a dispute arises. At stake are deeply embedded value systems which are likely to take substantial time to change, even if the desire to make such changes is strong.

Lawyer Considerations

Many of the individual inhibitions affecting clients are operative as well at the lawyer level. By the time most clients seek legal assistance, they have established in their own minds positions that they believe are at least defensible, if not correct. Notwithstanding the many unkind remarks made about lawyers, most clients, when it comes to their own matters, relish the concept of "lawyer as hired gun." Faced with these client expectations, lawyers are often reluctant to suggest approaches that do anything but vindicate their client's position. There is concern about appearing less than fully committed to their client's cause. There is also hesitance or lack of ability to diffuse the emotional attachment reflected in the client's position.

It takes certain skills to help people release or channel anger and use it to achieve more forward-looking results, and attorneys certainly are not trained for such tasks. In fact, almost the reverse is true. Lawyers are trained to represent their client's position zealously, as long as it is anything short of frivolous. The inclination, therefore, is not to look beyond the client's position to the underlying interests that could, perhaps, be better met in some alternative way, but to develop arguments and bases for advancing the client's position.

Finally, there is the ego of the lawyer who wants to think of and present himself or herself as able to deliver the result the client seeks, or better yet to exceed the client's expectations.

The same fears ultimately are likely to lurk beneath the lawyer's ego as underlie the ego of the client, thereby increasing the chances of commitment to protectionist strategies. What often occurs, in fact, is that the ego investment of the lawyers on both sides of a case becomes itself a driving force in strategy and other decisions.

For the lawyer on the other side of the case approached with a proposition suggesting some alternative methodology, there is yet another consideration. Given the training most lawyers have had and the adversarial atmosphere in which lawyers typically work, a not surprising first reaction to ADR often is suspicion. The ever-alert advocate is likely to assume, at least until proven wrong, that some trick or trap is involved. Feeling the same ego concerns and fears as the opposing counsel, this lawyer will want to insure that acceptance of such a proposal is neither a gullible action nor a disservice to his or her client. In addition to assuaging self doubts, the lawyer in such a situation also must convince the client of the benefits of this approach. The client is likely to have questions as to why the other side is proposing ADR or, why, if this step is so advisable, the client's own lawyer did not suggest it.

Because of self-doubts or client skepticism, the lawyer faced with a proposal to utilize an alternative means of dispute resolution may object or even aggressively oppose it. In that circumstance, it is incumbent on the side that initiated the idea to continue to support it calmly and resist the temptation to fight back. In many cases, after this initial testing period, the lawyer and client on the other side may be more willing to accept the proposal on its face value and embrace it as their own.

Exploring Attitude Shifts

Alternative methods of dispute resolution, other than those that provide a decision maker with authority to bind the parties, appear to demand levels of human behavior and personal autonomy that, for the most part, are not the norm. More than anything else, this may be the reason for reluctance to utilize these procedures. Recognition of this often overlooked factor, in and of itself, is likely to be a helpful first step. Open acknowledgment of such concerns can lead to efforts to address them.

These efforts, if they are to be successful, will require participation by both the legal and business communities, perhaps with the assistance of professionals trained to address more psychologically – and organizationally – rooted problems.

The way we handle disputes reflects the way we live in the world in a host of other circumstances. It is difficult to alter one while leaving the other completely intact. Even if that could be done, it is likely that the new systems eventually would develop the same deficiencies that now burden litigation or else become merely additional preliminary steps to be taken before ultimately resorting to litigation.

To avoid this likelihood, people should learn how to view disputes and the outcomes sought from new perspectives. At the individual level, it is possible to encourage a new way of looking at controversy by analyzing and, to some extent, redefining the context within which the problem developed. For example, if conduct is viewed as a breach of trust or an effort to take advantage, parties are likely to seek either vindication or retribution rather than a way to solve the underlying problem. From this perspective, the question traditionally answered by litigation (i.e., who is right) will appear controlling.

But, returning to the premise that people tend to act in their own self-interest, it is possible to view the inevitable clash of interests, even if some are ill-motivated, as a predictable consequence of functioning in the world, not as a breach of trust. In this context, who among the various actors is right need not, and in fact would not, be the only inquiry. Among the other questions raised in this broadened inquiry would be: Given the range of divergent interests, can a mutually acceptable accommodation be reached? Are there reasons why particular interests cannot or should not be accommodated? Are there factors outside the interests of the parties that should be taken into consideration from a precedent or policy perspective?

Ultimately, the parties still may conclude that what they need is a simple determination of right or wrong under a specific principle of law. But the process by which this conclusion is reached, if it is premised on a broader inquiry and goes beyond the sense of breached trust, is likely to be a constructive undertaking. Moreover, the process should lead the parties to choose and effectively use the dispute resolution vehicle most appropriate to their circumstances. At this stage, the vehicle itself becomes less significant as the parties will have agreed upon the critical question or questions to be answered and presumably will proceed, in whatever forum they choose, in an expeditious fashion. Attention will be focused on the investigation into the problem which the parties by this time will have mutually and reasonably defined.

To utilize such an approach, it is necessary at the outset to identify all the possible factors and considerations (legal, practical, personal, political, etc.) affecting the situation. An effort must then be made to suspend judgment long enough to get a sense of the overall picture presented by the circumstances. From there, the individuals involved can identify their priorities and decide how best to proceed.

Lawyers, if they are willing and able to do so, can assist their clients in achieving this broad view of the problem. They are at least one step removed from the emotion and ego concerns that often blind the involved parties. To the extent that lawyers perceive the client's expectations as seeking this type of assistance, their own ego needs will be met by providing it.

The lawyer and client should openly discuss any pressures on the client to seek specific end results. In this way, the client will be able to separate the external circumstances over which it has little or no control from internal aspects that may be more readily managed alone. Where external circumstances are a barrier, some corporations or other institutions may wish to undertake efforts to modify their corporate or institutional culture. This might enable people, for example, to take responsibility for errors without fear of unnecessarily harsh reprisals.

From an objective standpoint, an approach premised on this broad perspective can be undertaken without making unnecessary concessions so long as people are willing to rely on the type of internal strength described earlier. Outcomes that are fair, just, and practical may lack the bravura of big wins, but in the long run may be even more advantageous. Over time, a longer-term view may be valued as highly as the more traditional short-term win is today. In the interim, if the interest is in having the longer-term view prevail, it will take reinforcement from those in authority to sustain the people willing to reach for less than popular results.

The shift in consciousness needed to make such new values the norm is not likely to occur quickly, if at all. In the meantime, it is necessary to recognize the various conflicting pressures inherent in almost any dispute, and to be prepared to respond to whichever of those pressures is dominant. In this way, providers of dispute resolution services can respect individual value systems, and not try to push their clients to change their values or world views beyond where they are willing to go. Such coercive efforts not only would be unlikely to succeed but also are abhorrent to the underlying principles of many of the newly emerging forms of dispute resolution, certain of which are premised on not forcing standards or solutions on the parties.

Left to their own devices and instincts today, most lawyers and clients will still seek to "win" in a traditional sense. Until that definition of "win" is expanded to include mutual gain and loss and the enhancement of relationships, alternative methodologies may be forced into service of ends, such as defeating the opponent, that some of them at least were not devised to meet. Alternatively, they may come to be viewed as poor substitutes for litigation, which in some people's minds will remain "the real thing." Measured in monetary or other similarly stark terms, clients may achieve greater successes (and failures) through the traditional adversary process. If that is the case, there is little advantage in trying to convince them otherwise for that will only create expectations which in most cases will not be met. The result then is likely to be disillusionment and an even greater aversion to the alternative process than had they never participated in it.

It is preferable to outline honestly how an alternative process is advantageous, even if not likely to produce the same results as litigation. To the extent such an explanation highlights values that are of lesser interest to the parties involved than those vindicated through more traditional processes, traditional processes should be used. Proponents of alternative methodologies make a mistake trying to substitute one for the other, and risk loss of credibility in the process.

In this same vein, it is important to note that any time a mediation or negotiation breaks down and a more adversarial approach taken, it not be viewed as a failure of the alternative system. In an effort to avoid this unfavorable perception, many proponents of alternative dispute resolution get caught in the trap of pushing for resolutions at all costs, thereby perverting the process and often leading to dissatisfaction with the results. Yet, if one operated from a more comprehensive view of the problem and had identified the driving force, that is the ends sought, it may be obvious that use of more forceful means or imposition of a decision may be necessary at some point.

This sometimes is a hard lesson for advocates of alternative methodologies, many of whom themselves are driven by the same bottom line considerations that force their clients to take more adversarial positions. With the emphasis on statistics in terms of cases resolved and the need to justify the existence of the alternatives in monetary terms, these advocates are not willing to leave or make room for competing interests and approaches. Not surprisingly, they become models of the same behavior they ask their clients to eschew.

Again, at the core of this behavior are very real human needs and desires. The inability of some members of the dispute resolution community to deal with these needs and desires individually and work effectively among themselves provides another opportunity to explore the reasons why people generally may be reluctant to utilize less adversarial processes. By acknowledging our own reactions and recognizing our own vulnerabilities, those of us practicing in the field may gain the most valuable insights into resistance to alternative approaches and be better prepared to respond effectively.

NOTES

1. In some absolute sense, one can assume that anything one does is done out of self-interest or else it would not be done. For purposes of this commentary, however, a distinction is made between conduct that is outwardly inconsistent with one's apparent interests and conduct that, while outwardly inconsistent, may satisfy deep-seated psychological needs and from that perspective be totally consistent. Reference in this context is to the former.

2. In some situations, part, if not all, of the anger and frustration directed at the opposing party may more appropriately belong with oneself for mistakes made or some wholly unrelated third party against whom action is not possible but who in some way also is at fault. However, this is a subject that few people like to raise with each other, let alone lawyers with their clients. Lawyers are sensitive to the fact that a client's anger easily can transfer to a lawyer who is perceived by the client to be less than fully supportive of his position and thereby also in disagreement with him. Few lawyers like to get into this posture with their clients. It is easier and probably more lucrative to assume the role of avenger of the perceived wrong.

3. While alternative methodologies conceivably can be utilized for the same win/lose objectives, perhaps on a less costly and time-consuming basis, to do so may be unfortunate. If parties approach these alternatives with the same mindsets as they approach litigation in terms of results sought and tactics considered acceptable, we are likely over time to recreate many of the same problems that currently burden litigation. For example, if parties agree to mediate solely for the tactical reason of accomplishing delay, or attempt to manipulate or deceive each other in a mediation in order to achieve specific ends, mediation will quickly lose its attractiveness as a meaningful alternative. If so abused, mediation is likely to generate inappropriate results or else to be viewed as merely another maneuver in an already game-fraught system of dispute resolution.

4. In certain circumstances, a client may be more concerned about cultivating a particular perception than about responding to the situation created by the specific case. In such circumstances, it may be appropriate to determine a course of action on the basis of perceptions.

5. In the legal context, efforts to create an appearance of strength can include anything from posturing and bravado to pleading wars on a host of tangential issues.

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